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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

THE BANK OF NOVA SCOTIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented for Review

I. May a neutral non-party witness be held in civil contempt for abiding by foreign criminal laws and judicial decisions barring the production of documents located abroad when an effective alternative means of securing the same documents on a government-to-government basis exists?

II. Is the due process clause of the Constitution violated by the continuation of a daily contempt fine, aggregating $1,825,000, after a non-party witness has substantially completed the production of documents called for by a subpoena *duces tecum*?

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OPINION OF THE COURT BELOW

The final opinion of the United States Court of Appeals for the Eleventh Circuit in this matter, which is not yet officially reported, is reproduced as Appendix A. The final opinion of the United States District Court for the Southern District of Florida is reproduced as Appendix B. An earlier opinion of the Court of Appeals, which remanded this matter to the District Court, is reported at 722 F.2d 657 and appears as Appendix C. Orders of the District Court prior to the remand from the Eleventh Circuit are unreported, and appear as Appendices D through G.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on August 14, 1984. This petition was filed within ninety days of that date. The Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the due process clause of the fifth amendment to the United States Constitution, U.S. Const. Amend. V, which is reproduced as Appendix H. It also involves the provisions of the Federal Rules of Civil and Criminal Procedure relating to subpoenas and contempt, Fed. R. Civ. P. 17, Fed. R. Crim. P. 42 and 45, which are reproduced at Appendices I through K. The Cayman Islands Confidential Relationships (Preservation) Law (1976), *as amended* by the Confidential Relationships (Preservation) (Amendment) Law (1979), is a foreign statute essential to the consideration of this case, and appears as Appendix M.

STATEMENT OF THE CASE

Two distinct issues are presented for review in this case, involving (1) the enforceability of a grand jury subpoena *duces tecum* against a non-party witness who must violate foreign criminal laws and judicial orders to comply with the subpoena, and (2) the punitive use of civil contempt sanctions after the substantial completion of the production of documents called for in a subpoena *duces tecum*.[1]

The Bank of Nova Scotia ("the Bank") is a Canadian chartered bank with more than 1,200 branches, offices and

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1 Although these two issues were raised in separate appeals to the Eleventh Circuit (Nos. 83-5708 and 84-5198), they were ordered consolidated and were considered jointly by the Court of Appeals.

agencies in Canada and more than 45 other countries. Each office is licensed by and operates in accordance with the law of the jurisdiction in which it is located.

On March 4, 1983, the Bank's agency in Miami, Florida, was served with a grand jury subpoena *duces tecum*, issued by the United States District Court for the Southern District of Florida. The subpoena called for the production in Miami of documents located at the Bank's branches in the Commonwealth of the Bahamas, in the Cayman Islands and in Antigua. The documents sought were any and all records relating to accounts and transactions of four corporations and two individuals at those foreign branches during a six-year period commencing in 1976. During that period the Bank maintained ten branches in the Bahamas, one in the Cayman Islands, and one in Antigua.

Following receipt of the subpoena, the Bank's Miami agency promptly advised the branches in the Bahamas, Cayman Islands and Antigua of the service and requirements of the subpoena. Vol. II, tab D.[2] In searches shortly thereafter, records responsive to the subpoena were located in the Bahamas and the Cayman Islands. No responsive records were located in Antigua.

A. Facts Regarding Enforcement of the Subpoena

Bahamian and Cayman statutes prohibit production of banking records located in those countries, unless such production or disclosure is authorized by a court or other competent governmental authority, or by a bank's customer.[3] *See* Appendices L (Bahamian statute) and M (Cayman statute). Judicial

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2 Citations in this form are to the two volume Record Excerpts to the Record on Appeal filed with the Eleventh Circuit.

3 In this case, the U.S. Attorney expressly requested the Bank not to inform its customers of the existence of the subpoena. Vol. II, tab E, ex. 8.

or other governmental authorization is available only upon submission to the appropriate authorities of a statement of the specific purpose for which the documents are sought, together with a showing of their relevancy. Violation of either the Bahamian or Cayman law is a criminal offense punishable by fine and imprisonment. *See* Appendices L at 2l and M at 7m.

After receiving the subpoena, the Bank promptly advised the U.S. Attorney of the relevant foreign statutes, the procedures required to obtain authorization to comply with the subpoena, and the Bank's desire to cooperate in any lawful manner in the production of the documents. Vol. II, tab E, ex. 9. The Bank had no information that would enable it to make the showing required by Bahamian or Cayman law.

Following the U.S. government's refusal to explore alternative methods of obtaining the documents, or to provide the Bank with meaningful information that would enable it to make the showing required in the Bahamas and the Cayman Islands for leave to comply with the subpoena, the Bank made a motion to quash in the district court, on April 4, 1983. By order dated April 27, 1984, the district court, while declining to quash the subpoena, extended the date for production to May 31, 1983, and directed the government to provide the Bank with all assistance, short of seeking letters rogatory, in its efforts to obtain foreign governmental permission to comply with the subpoena.[4] *See* Appendix G.

Even minimal assistance from the government was not forthcoming.[5] Nevertheless, the Bank took every reasonable

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4 The district court order provided:

> Because the government may very well be able to assist the Bank in obtaining the documents, the government will be required to provide any reasonable assistance, especially in dealing with the foreign governments; however, the government is not required to forward letters rogatory.

Appendix G at 2g.

5 In response to the district judge's inquiry as to the assistance provided to the Bank pursuant to the April 27 order, an assistant U.S. attorney responded, "We have provided nothing." Vol. I, tab E at 24.

effort to produce the documents in a lawful manner. The Bank's efforts to comply included petitioning the Grand Court of the Cayman Islands for permission to produce the documents. On May 31, 1983, the Grand Court denied that petition, and enjoined the Bank from producing the documents. However, the Grand Court granted leave to renew the application upon a showing that the documents related to an act, such as trafficking in narcotics, recognized as criminal in both the Cayman Islands and the United States. *See* Appendix N.

But unknown to either the Bank or the district court, although clearly known to the government, the Cayman and United States governments had previously negotiated a direct government-to-government procedure for providing assistance to U.S. law enforcement agencies seeking records from the Cayman Islands. Vol. II, tab L, exs. 2-A, 2-B, 2-C. The government never explored the use of the agreed procedures in this case, nor did it advise the district court or the Bank of their existence. Vol. II, tab O. However, it was established before the district court, through representations by the Cayman Islands, as *amicus*, and testimony of a Cayman lawyer, that use of the government-to-government method provided in the agreed procedures would have resulted in the lawful release of the Cayman documents sought from the Bank. *See* Vol. II, tab B at 85.

On June 1, 1983, the Bank again applied to the district court for relief. The district judge left that motion undetermined for more than four months, until October 10, 1983, when he ordered the Bank to comply with the subpoena by October 17, or face a contempt hearing on October 21. *See* Appendix F. That order was not appealable. As the Bank was still barred by both Bahamian and Cayman criminal statutes from producing the documents, the Bank could not do so. At the hearing, the district judge found the Bank in contempt for its refusal to produce documents in violation of foreign criminal laws and a court order. The district court imposed a fine of $25,000 a day, to begin on October 26 and to continue until the Bank complied with the subpoena or until the grand jury expired. *See* Appendix E.

The Bank appealed. The district court judge denied the Bank's motion for a stay pending appeal. The court of appeals granted a stay on October 25, 1983, but on the government's motion vacated the stay and reimposed the fine effective at noon on November 14, 1983. Justice Powell denied the Bank's application for a stay pending the hearing and determination of the Bank's appeal. That appeal was not heard until December 12, 1983.

On Friday, November 11, 1983, the Attorney General of the Bahamas issued a ruling that the documents then known to the Bank to be responsive to the subpoena were not covered by the Bahamian privacy statute, and could lawfully be produced in response to the subpoena. The Bank delivered those documents to the government on the morning of Monday, November 14, 1983, prior to the time the contempt fine began to accrue. Vol. II, tab R.[6]

On November 17, the Bank was authorized to produce the Cayman documents, as the result of an extraordinary and unprecedented ruling by the Governor of the Cayman Islands. In granting that authority, the Governor relied on a previously unused section of the Cayman statute, *see* § 3(2)(b)(iv), Appendix M at 4m, which provides that the Governor may exempt certain information from the scope of the statute. The Bank immediately produced all responsive documents from the Cayman Islands, three days after the contempt fine began to accrue. Vol. II, tab S.

After receipt of *amicus curiae* briefs from the governments of Canada, the United Kingdom, and the Cayman Islands, as well as the Canadian Bankers' Association, the court of appeals heard oral argument on December 12. On December 28, the court of appeals remanded the case to the district court for

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6 Accordingly, matters relating to the Bahamian financial privacy laws are not at issue in this matter. *See* section 10, The Banks and Trust Companies Regulation Act of the Bahamas (1965), *as amended*, reproduced as Appendix L.

consideration of relevant information not before it, including the views of the *amici* and the facts regarding the government-to-government procedure established between the United States and the Cayman Islands. The hearing on remand was held by the district court on February 14, 1984, and the district court judge rendered his report to the court of appeals on February 28, 1984. *See* Appendix B.

B. Facts Regarding Production of Documents

At the time the contempt fine against the Bank became effective on November 14, the sole issue that had been before the district court with respect to the Bank's compliance with the subpoena related to the significance of the prohibitions of foreign law. No question about the Bank's diligence in conducting the physical search for documents had ever been raised. On November 14, the Bank produced all of the Bahamian documents responsive to the subpoena found by the Bank's Bahamian personnel in the course of several prior searches of the ten Bahamian branches. *See* Vol. II, tab B at 34-7, 59. And on November 17, the Bank produced all of the responsive documents from the Cayman Islands.

Shortly after the production of the Cayman documents, which completed the production of all documents then known to the Bank to be responsive to the subpoena, an assistant U.S. attorney advised the Bank's counsel that additional documents existed. He declined to provide any identification of those documents. The Bank thereupon dispatched from its head office a special search team, supervised by a senior inspector, to conduct new searches of the Bank's Bahamian, Cayman Islands and Antigua branches. Vol. II, tab B at 38-9. No additional documents were located in the Cayman Islands or Antigua branches. Vol. II, tab B at 34. In the Bahamas the special inspection team discovered certain additional documents at two of the ten Bahamian branches, the bulk of which were found in a mislabeled box. Vol. II, tab B at 41. Over 10,000 boxes of documents exist in the Bank's Bahamian

branches. Vol. II, tab B at 34. Bank personnel spent approximately 975 hours searching for documents responsive to the subpoena. Vol. II, tab B at 60. The newly discovered documents were produced to the government on December 5, 1983. Vol. II, tab B at 43. No objection was made as to the completeness of that production.

Following completion of the additional searches, the senior inspector in charge of the inspection team returned to Miami to be available to testify with respect to the Bank's documents. Vol. II, tab B at 44-6. On January 24, 1984, prior to the hearing on remand, the senior inspector appeared before the grand jury to authenticate the documents produced by the Bank in response to the subpoena. In the course of preparing for that appearance, he located four fanfold carbon copies of Bahamian documents that had previously been produced. Vol. II, tab B at 45-7. Those four copies were produced immediately. The Eleventh Circuit noted that the four copies differed from the previously produced documents only in having certain "different markings." *See* Appendix A at 9a n.8.[7] The uncontested testimony before the district court was that the "markings" imparted no information not previously provided to the grand jury by the Bank. Vol. II, tab B at 49-50.

Contemporaneously with the remand proceedings in the district court, by which time all of the documents had been produced, the government moved for judgment against the Bank in the amount of $1,825,000. That amount was calculated by multiplying the daily fine of $25,000 by the number of days that elapsed between the date fixed for commencement of the fine (November 14, 1983) and the date when the four carbon copies were produced by the Bank (January 25, 1984). The district court granted judgment for the full amount

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7 The Eleventh Circuit opinion creates the impression that documents other than the four carbon copies were produced by the Bank for the first time on January 25. Appendix A at 9a. In fact, the only document produced on January 25 other than the four carbon copies was the original of a document previously produced by the Bank in photocopy form. *See* Vol. II, tab B at 50.

claimed by the government. The Bank's appeal from that judgment was consolidated with the pending appeal from the district court's order enforcing the subpoena and holding the Bank in contempt.

The court of appeals disposed of both appeals in a single opinion rendered on August 14, 1984, which so intertwines the two issues as to obscure the rationale of its decision. By this petition, the Bank seeks review of and relief from both elements of that decision.

REASONS FOR GRANTING THE WRIT

The decision below is a grossly unfair departure from the rule of law. In the context of an actual and serious controversy, the case presents questions of federal law that have not been, but which should be, and can only be, answered by this Court. Those questions are of Constitutional magnitude and implicate as well issues of international law that urgently require resolution. Enforcement of the subpoena and imposition of the sanctions applied by the court below is clearly in conflict with the decision of this Court in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (hereinafter "*Rogers*"), and with the decisions of courts of appeal in other circuits.

A. Enforcement of the Subpoena and Coercion of Criminal Acts

1. The Importance of the Question

The fundamental question raised by this case is whether the lawful presence in the United States of a foreign business entity justifies the coercion of that entity, through the enforcement of a subpoena and the imposition of the contempt sanction, to violate the domestic criminal laws and judicial orders of a friendly foreign nation. This is a question of great current significance for the United States, its allies and trading partners, and for multinational business enterprises, in view of the

vastly increased internationalization of world business, as well as the increasing frequency with which U.S. law enforcement authorities are seeking to compel the production of documentary and testimonial evidence from abroad. Interpretation of the applicable principles of law requires the attention of this Court.

Cases of this type—in which a disinterested business entity, generally a financial intermediary, is present somewhere in the United States and is served with a grand jury subpoena or similar process requiring the production of documents located at a non-U.S. office—have become almost commonplace.[8] However, as many countries prohibit the removal of business records or the disclosure of customer information, such a subpoena places the recipient in a dangerous dilemma: resist the subpoena or violate the foreign law. In turn, this threatened violation of foreign law, perceived to be compelled by a United States court, both angers the foreign sovereign[9] and precipitates countermoves.[10] Indeed, the reporters' notes to the tentative draft of the revised *Restatement* observe:

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8 *Garpeg, Ltd. v. United States*, No. 84 Civ. 0437 (S.D.N.Y. July 10, 1984); *In re Grand Jury Proceedings. United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3086 (1983); *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *In re Grand Jury 81-2*, 550 F. Supp. 24 (W.D. Mich. 1982); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

9 Three governments—those of Canada, the Cayman Islands, and the United Kingdom—participated actively as *amici* in support of the Bank in the courts below.

10 Some countries have adopted statutes designed expressly to frustrate U.S. discovery efforts. *See, e.g.*, [1980] Journal Officiel de la Republique Francaise 1799, Law No. 80-538; Protection of Trading Interests Act (1979) (United Kingdom); *cf.*, the great number of signatories to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444, which have taken exception to the pre-trial discovery provisions, including the Federal Republic of Germany, Italy, the Netherlands, Norway, Portugal, Singapore, Switzerland, and the United Kingdom.

> No aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.

Restatement (Revised) of Foreign Relations Law of the United States § 420 reporters' notes at 18 n.1 (Tent. Draft 3, 1982).

An effective alternative to the legal warfare precipitated by resort to costly subpoena enforcement is a direct government-to-government mechanism, such as the Cayman Islands-United States procedures that were available, although eschewed, in this case.[11] The existence of such direct mechanisms raises a related and important question of Constitutional due process: may a neutral non-party witness be placed in contempt for abiding by foreign criminal laws and judicial decisions barring the production of documents located abroad, when an effective alternative means of securing the same documents on a government-to-government basis exists?

2. The Conflict with Applicable Decisions of this Court

The decision by the court of appeals disregards prior decisions of this Court that recognize the importance that the prohibitions of foreign law have with respect to international discovery efforts. This Court has consistently recognized that prohibitions of foreign law constitute a "weighty excuse" for nonproduction of documents. In *Rogers*, 357 U.S. 197 (1958),

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11 The governments of the United States and the Cayman Islands have recently concluded another agreement regarding discovery of evidence from the Cayman Islands in narcotics cases. *Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Cayman Islands and matters connected with, arising from, related to, or resulting from any narcotics activity referred to in the Single Convention on Narcotic Drugs, 1961* as amended *by the Protocol Amending the Single Convention on Narcotic Drugs, 1961* (July 26, 1984). Under that agreement, the United States will not seek to enforce subpoenas for Cayman documents in specified classes of cases.

the Court reversed a district court's imposition of sanctions on a party who had in good faith attempted to comply with a discovery order which required a violation of foreign law. Enforcement of the contempt order here conflicts with the solicitude for foreign law reflected in *Rogers*. The Bank, despite its good faith efforts, could not have complied with the order without violating the criminal laws of the Cayman Islands.

The principle enunciated in *Rogers* is reflected in the federal rules of civil and criminal procedure. Under Federal Rule of Criminal Procedure 17(g) and Federal Rule of Civil Procedure 45(f), a person may not be held in contempt if there is "adequate excuse" for failing to obey a subpoena. *See* Appendices J and K; *Rogers*, 357 U.S. at 211 ("fear of criminal prosecution constitutes a weighty excuse for nonproduction"); 28 U.S.C. § 1826(a) (a recalcitrant witness may be confined for refusing to testify or produce documents only if shown to be acting "without just cause"). The Eleventh Circuit has ignored both *Rogers* and the procedural rules adopted under the auspices of this Court.

In *United States v. Ryan*, 402 U.S. 530 (1971), this Court reiterated in dicta the *Rogers* holding that sanctions are improper if the witness has made good faith efforts to comply, but is unable to do so for fear of criminal prosecution abroad. 402 U.S. at 534. The *Ryan* case involved a grand jury subpoena for documents in Kenya. Although Kenyan law on its face prohibited compliance, the district court insisted that the witness apply in Kenya for the release of documents. The district court further provided that if the witness' application were denied, the witness would be excused from producing the subpoenaed documents to the grand jury. Further, the government would then be required to proceed in a manner consistent with the Kenyan statute.

Rejecting all concern for foreign laws and the Bank's efforts to comply, the Eleventh Circuit makes success or failure in producing the documents the sole test of whether sanctions should be imposed. While the circuit court concluded that the Bank did not exercise good faith with respect to its efforts to

avoid foreign legal prohibitions, the court's only specific criticism was to note that the Bank did not appeal the Cayman Court order denying the Bank's application. Appendix A at 4a. Good faith, however, does not require a party to undertake a fruitless act. First, the Bank's application was denied without prejudice and with leave to reapply. The Bank in fact reapplied. *See* Appendix N. Second, an appeal would clearly have been pointless. Without the cooperation of the U.S. government, the Bank was unable to furnish the Cayman court with the information required under the statute. The Bank also lacked any basis on which to challenge the Cayman legal standard for releasing bank records. The circuit court's criticism was wholly unjustified.[12]

Not only does the Eleventh Circuit reject the *Rogers* holding, but it purports to adopt a balancing test that has never been reviewed, sanctioned or applied by this Court, and has been criticized by many authorities. The Eleventh Circuit, as well as other circuit and state courts, uses section 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) as the exclusive test in extraterritorial discovery cases, although it has been faulted as not adequately considering the underlying policies of foreign states. *See* Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*. 50 Fordham L. Rev. 877, 900 (1982); Note, *Foreign Nondisclosure Laws and Domestic Orders in Antitrust Litigation*, 88 Yale L.J. 612, 621 (1979). Both federal and state courts would benefit from this Court's evaluation of that test.[13]

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12 This case is distinguishable from *In re Grand Jury Proceedings. United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 3086 (1983), where the witness had not made efforts abroad, and, therefore, failed to act in good faith as a matter of law. In the present case, however, the Bank, acting in light of *Twist*, made meaningful efforts abroad to secure the lawful release of the documents and did produce them.

13 Not all lower courts use the § 40 *Restatement (Second)* test. *See United States v. Toyota Motor Corp.*, 569 F. Supp. 1158, 1162 (C.D. Cal. 1983), which has adopted § 420 of the *Restatement (Revised)*.

(footnote continued)

3. The Conflict of Decisions by the Circuit Courts

The Eleventh Circuit decision presents a conflict with holdings of several other circuits which should be resolved by this Court. For example, in *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the district court imposed sanctions on a non-party bank witness who refused to violate Greek privacy laws by producing documents from its branch in Greece. The Seventh Circuit, noting the vital interests of Greece in maintaining the integrity of its financial system through the bank secrecy statute, reversed the lower court order. The government did not seek review of that decision.

The Eleventh Circuit decision in the present case is also at odds with Second Circuit holdings. In *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), the Second Circuit modified a subpoena issued to the Chase Manhattan Bank that required the disclosure of documents located in Panama in violation of that country's laws. The Second Circuit, rather than coerce the violation of foreign law by a non-party witness, placed the responsibility with the U.S. government to obtain the documents through negotiations with the Panamanian government. The Second Circuit stated:

The circuit court also misapprehended the teaching of this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The separation of powers doctrine, a "constitutional underpinning" of the act of state doctrine, proscribes use of the judiciary to implement foreign policy, just as it proscribes encroachment by the judiciary on the foreign policy prerogatives of the executive branch. That principle is violated when, as the record in this case indicates, the executive seeks to use judicial power as a tool to achieve a political objective, such as the alteration or subversion of domestic law in friendly foreign countries. *See* Vol. I, tab K at 38 (suggestion of assistant U.S. attorney that enforcement of the subpoena would cause the Bahamian government to "rethink" their policies); *U.S. v. First National City Bank*, 379 U.S. 378, 401 (1965) (Harlan, J. dissenting opinion); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Douglas, J. concurring opinion).

> Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.

297 F.2d at 613.

Similarly, in *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960), the Second Circuit refused to enforce a subpoena against the Bank of Nova Scotia requiring the production of records located in Canada. Observing that an agreed procedure between the United States and Canada existed for the release of documents in Canadian banks, the court held:

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.

282 F.2d at 152.[14]

The intervention of this Court is necessary to harmonize the conflicting decisions of the circuits.

4. The Departure from the Accepted and Usual Course of Judicial Proceedings

The import of the decision below is that a non-party witness, served with a grand jury subpoena, must promptly and without

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14 As the Eleventh Circuit points out, the circuits are also in conflict as to whether the U.S. government, in appropriate circumstances, should be required to demonstrate the relevancy and materiality of information sought by a grand jury subpoena. *See* Appendix A at 13a n.12; *compare In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3rd Cir. 1973); *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3rd Cir.), *cert. denied*, 421 U.S. 1015 (1975) (imposing a requirement that the U.S. Attorney demonstrate relevancy and necessity with respect to grand jury subpoenas) *with In re Grand Jury Proceedings. United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3086 (1983) (refusing to adopt a requirement of relevancy); *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980), *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978).

hesitation violate the criminal laws of friendly foreign sovereigns, if that is what compliance with the subpoena might require. The threat of imprisonment, fines, and other sanctions that may befall the non-party is to be ignored.[15] Further, the non-party witness is required to commit such violations notwithstanding the ready availability to the government of an effective alternative means for securing exactly the same materials without precipitating a breach of foreign law. The solicitation to international lawlessness established in the district and circuit court decisions is entirely antithetical to the accepted and usual course of judicial proceedings established by this and other courts.

The Eleventh Circuit has renounced the established standard of good faith with respect to a witness' efforts to comply with extraterritorial subpoenas, simply ignoring the "weighty excuse" to nonproduction that the fear of criminal prosecution provides. *See Rogers*, 357 U.S. at 211; Fed. R. Crim. P. 17(g), Appendix J; Fed. R. Civ. P. 45(f), Appendix K. While disregarding these established landmarks, the decisions below furnish no guidance to neutral witnesses, prosecutors or courts as to the proper relationship between the enforcement of domestic subpoenas and the conflicting mandates of foreign criminal laws. Accordingly, the intervention of this Court is essential.

B. Punitive Fine and Production of Documents

1. The Importance of the Question and the Departure from the Accepted and Usual Course of Judicial Proceedings

A contempt fine of $1,825,000 has been imposed on the Bank, based on seventy-three days of an alleged civil contempt at $25,000 per day. As a civil contempt necessarily rests on the validity of the underlying order, the invalidity of the enforce-

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15 In another case with nearly identical facts, the Eleventh Circuit has demonstrated more concern for the interests of non-party witnesses and their exposure to criminal liability in other jurisdictions. *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. pet. filed*, No. 84-270 (U.S. Aug. 6, 1984).

ment order in this case requires that the civil contempt and the resulting fine be vacated. Even assuming the validity of the enforcement order, the assessment of contempt fines in this case so far departs from the accepted and usual course of judicial proceedings as to require this Court's review.

The first three days for which the fine was assessed covers the period after the Bank had commenced the production of Bahamian documents, but before the bar of Cayman criminal law had been lifted. The balance of the fine relates only to the period during which the Bank was producing documentary evidence to the grand jury from the Bahamas. On December 5, document production by the Bank was substantially complete, by which time $525,000 in fines had accrued. The remaining fine, of $1,300,000, is based solely on the period between the Bank's substantially complete production of Bahamian documents on December 5 and the Bank's later production, on January 25, of four carbon copies of documents previously produced. Contempt fines in that magnitude are purely punitive and cannot be sustained.

It is an elementary principle that the purpose of an order of civil contempt is coercive, and that such contempt terminates when the court's order is obeyed. *Shillitani v. United States*, 384 U.S. 365 (1966). Civil contempt therefore differs materially from criminal contempt, which has the purpose of punishment. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). A witness accused of criminal contempt is entitled to substantial Constitutional due process rights, including the right to notice and a hearing. *See* Fed. R. Crim. P. 42(b), Appendix I; 18 U.S.C. § 401; *In re Stewart*, 571 F.2d 958 (5th Cir. 1978)(contempt fines which are in part remedial and in part punitive are regarded as criminal for purposes of due process).

In this case, the district court's order of contempt was clearly intended to be remedial, and imposed to coerce the Bank to end its assertion of the bar of foreign criminal law as an excuse for non-compliance with the subpoena. At the time of the district court's order of contempt, the issue of the

completeness of the Bank's search had not arisen. Accordingly, the Bank complied with the contempt order when it stopped asserting the prohibition of foreign law, which it did when it produced the Cayman documents on November 17. Even assuming that the contempt order was properly issued, the contempt fine should terminate at the time when the Bank had produced both Bahamian and Cayman documents.

If the civil contempt order is construed to have a broader purpose—to coerce the Bank not only to produce documents notwithstanding foreign legal prohibitions, but to complete the production of evidence to the grand jury—that purpose was also achieved well before the fine reached the $1,825,000 calculated by the district court and the Eleventh Circuit. By December 5, the Bank had produced all documents, except for the four carbon copies.[16] By that date, the government, the district court and the Bank had no reason to believe that any of the Bank's evidence had not been produced. The coercive purpose of the contempt had been fulfilled, and the Bank had produced all of the documents it reasonably believed to exist. Additional fines could not coerce the Bank, but only punish it. The four carbon copies produced on January 25 (for which an additional $1,300,000 in fines was assessed) differed from previously produced items only in bearing certain "different markings." *See* page 8, *supra*; Appendix A at 9a n.8. The uncontested testimony below was that those markings imparted *no* new information.

By any standard, the purpose of the civil contempt was achieved not later than December 5. The fines assessed after that date are punitive. As the Bank did not receive the procedural due process accorded for criminal contempt, the entire contempt fine must be vacated. This Court should exercise its supervisory powers to ensure that lower courts do not obscure the distinction between civil and criminal contempt, and thereby deprive litigants of their Constitutionally guaranteed due process rights.

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16 *See U.S. v. Rizzo*, 539 F.2d 458 (5th Cir. 1976) (subsequent production of responsive documents does not prolong civil contempt beyond earliest date of good faith effort to comply with discovery demand).

CONCLUSION

This petition for certiorari should be granted and, upon review, the decisions of the court of appeals and the district court should be reversed.

Dated: New York, New York
August 31, 1984

Respectfully submitted,

/s/ Henry Harfield

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APPENDIX A

Opinion of the
United States Court of Appeals
for the Eleventh Circuit

IN RE: GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THE BANK OF NOVA SCOTIA,

Defendant-Appellant.

Nos. 83-5708, 84-5198

United States Court of Appeals,
Eleventh Circuit.

August 14, 1984.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and ANDERSON, *Circuit Judges*, and BOYLE*, *District Judge*.

FAY, *Circuit Judge*:

This case is an appeal by the Bank of Nova Scotia ("The Bank"), of an order of civil contempt and the imposition of a

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* Honorable Edward J. Boyle, Sr., U. S. District Judge for the Eastern District of Louisiana, sitting by designation.

$1,825,000 fine entered by the United States District Court for the Southern District of Florida. On numerous occasions the district judge ordered the Bank to comply with a grand jury subpoena *duces tecum*. The Bank continuously disregarded the court's orders. The district judge concluded that the Bank did not act in good faith and found it in contempt of court. He imposed a $25,000 per day fine for as long as the Bank did not comply with the subpoena. The Bank challenges the order on various diplomatic and legal grounds. After a careful review of the record we conclude that the district judge was extremely patient. He did not abuse his discretion in finding the Bank in contempt of court and imposing the fine.

I. *FACTS*

The Bank of Nova Scotia is a Canadian banking corporation, headquartered in Toronto, with over 1,200 branches, offices and agencies in forty-six countries. On March 4, 1983, the Bank's Miami office was served with a grand jury subpoena *duces tecum* issued by the United States District Court for the Southern District of Florida. The subpoena called for the production of financial documents pertaining to two individuals and three companies from the Bank's branches in the Bahamas, the Cayman Islands and Antigua.[1] On March 22, 1983, the Bank's Miami office sent telexes to the Bahamian and Cayman branches informing them of the subpoena and asking them to search for the requested documents. The Bank produced no documents at its March appearance before the grand jury. On April 4, 1983, the Bank filed a motion to quash in the district court asserting that if it complied with the subpoena it would violate the secrecy laws of the Bahamas and

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1 The Bank investigated and found none of the requested documents at its Antigua branch. Therefore, that part of the subpoena is not at issue. The individuals and corporations named in the subpoena are Frank Brady, Paula Brady, Frank J. Brady Enterprises, Inc., Brady Farms, Inc., and Clay Island Farms, Inc.

the Cayman Islands.[2] The court denied the motion and ordered the Bank to produce the documents by May 31, 1983.

During the month of May the Bank made no effort to comply with the court's order by searching for the subpoenaed documents. Instead the Bank spent its time corresponding through counsel with the Assistant United States Attorney handling the grand jury proceedings. The Bank continuously requested the government to send letters rogatory and to show the materiality and necessity of the subpoenaed documents to the grand jury investigation. The government repeatedly stated that it was willing to provide any requested assistance, short of showing materiality and necessity or sending letters rogatory.

The only other effort by the Bank during the month of May to comply with the district court's order was the filing of a petition before the Grand Court of the Cayman Islands for permission to disclose the documents sought in the subpoena. The Grand Court denied the petition on May 31, 1983, but granted the Bank leave to renew it at a later date. The Court

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2 The relevant section of the confidentiality law of the Cayman Islands reads as follows:

> 3A. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.
>
> (2) Application for directions under subsection (1) shall be made to, and be heard and determined by, a Judge of the Grand Court sitting alone and *in camera*. At least seven days' notice of any such application shall be given to the Attorney General and, if the Judge so orders, to any person in the Islands who is a party to the proceedings in question. The Attorney General may appear as *amicus curiae* at the hearing of any such application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either personally or by counsel.

Section 3A(1)-(2) of the Confidential Relationships (Preservation) Law of 1976 (as amended in 1979).

The Bank concedes, on page eight of its supplemental brief, that the Attorney General of the Bahamas authorized the Bank to release the documents prior to the time the contempt sanction became effective. Thus, the Bahamian documents "are not at issue in this appeal."

further ordered the Bank not to produce the subpoenaed documents. The Bank never appealed this order to the Court of Appeals in Jamaica.

On June 1, 1983, the Bank filed another motion for relief from the subpoena in the district court. The court denied the motion on October 10, 1983, and ordered the Bank to comply with the subpoena by October 17, 1983, or face a contempt hearing on October 21, 1983. The Bank's only effort to locate any documents either in the Bahamas or in the Caymans between the June first motion and scheduled October hearing was a search conducted in Nassau on October 14, 1983, which produced no documents. The only document produced by the Bank during this seven month period was a xerox copy of a draft[3] drawn to Paula Brady by the branch in Nassau for $163,892.33. At the hearing the district court concluded the Bank had not made a good faith effort to comply with the subpoena and found it in contempt. The court imposed a fine of $25,000 per day, beginning on October 26, 1983, and continuing until the Bank complied with the subpoena or the grand jury expired. We stayed the fine from October 25, 1983 until November 14, 1983.

On November 11, 1983, the Attorney General of the Bahamas issued an order allowing the Bank to produce the requested documents. He concluded that since the Bahamian branch did not have an account relationship with the subjects of the subpoena the dealings of the parties in the Bahamas were not protected by the Bahamian bank privacy statute. On November fourteenth, just prior to the lifting of the stay of the $25,000 per day fine imposed by the district court, the Bank delivered the following documents from its Bahamian branches:

Copies of the following Certificates of Deposit:

a) CD 6511601 issued on March 2, 1979, for $50,000 payable to Paula or Frank Brady.

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3 A draft in the Bahamian islands is the same thing as an American cashier's check.

b) CD 6511799 issued on March 2, 1979, for $50,000 payable to Paula or Frank Brady.
c) CD 6511800 issued on March 2, 1979, for $50,000 payable to Paula or Frank Brady.

Draft requisition dated November 8, 1982, by Paula Brady drawn on Manufacturer's Hanover in New York for $163,892.33.

Nassau branch copy of the draft requisition of November 8, 1982.

Receipt dated November 8, 1982, signed by Paula Brady.

After this disclosure the Assistant United States Attorney insisted that there were Bahamian documents still missing. The Bank reiterated that all of its branches in Nassau had been searched and there were no other documents in the Bahamas.

On November 11, 1983, the Grand Court of the Cayman Islands reconsidered the issue of disclosure and again refused to permit the Bank to disclose the records. However, the Governor of the Islands, pursuant to Section 3(2)(b)(iv) of the confidentiality statute,[4] authorized the disclosure of the subpoenaed documents on November 17, 1983. The Bank immediately produced all of the documents which had been located at the Cayman branch of the Bank. Once again the Assistant United States Attorney reiterated that a substantial number of documents still had not been produced from the Bahamian branches in spite of the ruling by the Attorney General of the Bahamas permitting disclosure.[5]

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4 Section 3(2)(b)(iv) of the Confidential Relationship (Preservation) Law of 1976 (as amended in 1979) states:

> (2) This law has no application to the seeking, divulging, or obtaining, of confidential information—. . .
>
> (b) by or to . . .
>
> (iv) the Financial Secretary, the Inspector or, in relation to particular information specified by the Governor, such other person as the Governor may authorise; . . . .

5 Of the $1,825,000 fine imposed by the district court, only $100,000 is attributable to the failure to produce records from both the Bahamas

In late November, 1983, Mr. Nicol, the assistant chief inspector for the Bank, was ordered to go to the Bahamas and "insure that [an] effective search had been carried out of the Bank's records in the Bahamas." Mr. Nicol arrived in Nassau on November 24, 1983, and immediately discovered additional documents in two of the Bank's Bahamian branches.[6] As a result of his search photocopies of the following items were turned over on December 5, 1983:

Composite 1: CD 1093134 dated January 11, 1979, for $20,000.
The register copy of this CD.
The diary debit copy showing that it was paid on April 11, 1979.

Composite 2: CD 1093357 dated April 11, 1979, for $20,542.46.
The register copy of this CD.
The auditor's copy of this CD.

Composite 3: CD 1093181 dated January 31, 1979, for $50,000.
The register copy of this CD.

Composite 4: CD 1093300 dated March 20, 1979 for $200,000.
The register copy of this CD.

Composite 5: CD 1093329 dated March 28, 1979, for $150,000.

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and the Cayman Islands. The remainder of the fine is imposed solely because of the failure to produce the Bahamian records until January 25, 1984. There was absolutely no question whatsoever concerning the Bahamian records after November 11, 1983.

6 Mr. Nicol began his search by opening a sealed list of dormant accounts which revealed one of the target names on the subpoena. He noticed that all of the 1979 records appeared to be missing. He then ordered a physical search of the archives room which revealed a box of vouchers with no label. This box held most of the items requested in the subpoena.

The register copy of this CD.
The auditor's copy of this CD.

Composite 6: Draft sold to Paula Brady payable to Brady Farms for $100,000 on January 11, 1979.
Requisition for the draft.

Composite 7: Draft sold to Frank Brady payable to Brady Farms for $200,000 on February 23, 1979.
Requisition for the draft.

Composite 8: Draft sold to Frank Brady payable to Brady Farms for $40,000 on February 23, 1979.
Requisition for the draft.

Composite 9: Draft for $225,000 sold on March 19, 1979, payable to Brady Farms.
Requisition for the draft.

Composite 10: Draft sold to Frank Brady payable to Clay Island Farms for $250,000 sold on April 18, 1979.
Requisition for the draft.
Prior cancelled requisition for the draft.

Composite 11: Draft sold to Frank Brady payable to Calleaders Orr and Company for $170,000 sold on April 18, 1979.
Requisition for the draft.
Prior cancelled requisition for the draft.

The following other items were also produced on December 5, 1983:

Operation of Foreign Currency Deposit Account dated January 11, 1979, signed by Paula and Frank Brady.

Bank Form 702: Current Account document and operating record.

Several checking account statements.

Deposit slip dated March 20, 1979 and a credit memo with the same date.

Deposit slip and credit memo dated April 12, 1979.

Deposit slip and credit memo dated April 18, 1979.

A credit to the bank commission account for $1,191.90 for a handling charge.

Three checking account statement for West Indies Island Tourist Company, LTD.

Checking account statement in the F.N. Bowe "U.S. Dollar" account.

On December 9, 1983, the Assistant United States Attorney informed the Bank that he needed a Bank employee to appear before the grand jury on December 20, 1983, to authenticate all of the documents that had been produced. The government's attorney reminded the Bank that only copies of the documents had been produced and requested that the authentication witness bring the originals. The Bank decided that it would send Mr. Nicol to appear before the grand jury but did not notify him until December nineteenth. As a result of the Bank's delay, his appearance before the grand jury was rescheduled for January 24, 1984.

We heard oral argument on the expedited appeal on December 12, 1983. Since much had transpired during the pendency of the appeal we remanded the case to the district court for further proceedings[7] and retained jurisdiction. *In re Grand Jury Proceedings, United States v. The Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983).

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7 We remanded the case for several reasons. During oral argument the bank asserted that it had fully complied with the subpoena and the government disagreed. We found out there existed a Single Convention on Narcotic Drugs (1961) signed by both the United States and the Cayman Islands and a letter agreement between the officials of both countries that allegedly controlled this situation. Neither of these agreements was brought to the attention of the trial judge. In addition, the views of various *amici*, *i.e.*, the government of Canada, the Canadian Bankers' Association, the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands, were never presented to the district court at the first proceedings.

In January, Mr. Nicol began preparing for his appearance before the grand jury. While reviewing the documents he realized that a number of vouchers were still missing. He once more contacted the Bahamian branches and requested that the boxes of records be searched. On January 23, 1983, the Bank found additional documents in the Bahamas. The following documents,[8] along with the original of the draft produced on October 20, 1983, were delivered on January 25, 1984:

Four vouchers of the CDs redeemed on April 18, 1979.

Cancelled draft 184901 dated November 8, 1982, to Paula Brady for $163,892.33 drawn on the Bank in Nassau and deposited to the F.N.Bowe "U.S. Dollars" account in Nassau.

Diary debits to GL at maturity for:

CD 1093300 in the amount of $220,000
CD 1093329 in the amount of $150,000
CD 1093181 in the amount of $ 50,000
CD 1093357 in the amount of $ 20,542.46

The hearing on remand was held on February 14, 1984. Most of the evidence introduced by the Government at the hearing consisted of affidavits.[9] They also submitted the transcript of Mr. Nicol's appearance before the grand jury. The documentary evidence presented by the government was letters from the Bank's counsel transmitting some of the subpoenaed documents. The government called only one witness, Norman

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8 The Bank asserts that these documents were identical in content to the documents produced by the Bank on December 5, 1983. The vouchers submitted to the government on January 24, 1984, were one copy of a four-part form, but once the form is separated each part acquires different markings on its independent routing through the Bank.

9 Although the Government had all of the witnesses whose affidavits had been submitted to the court present in the courtroom, the Bank chose not to cross-examine any of them.

Washington Hill, a member of the Bar in England, and an attorney in the Cayman Islands since 1970.[10]

The Bank called three witnesses, Mr. Nicol, Mr. Richard John Marshall, an attorney at law in the Cayman Islands, and Mr. Scott McDonald, the vice-chairman of the Bank's Board of Directors. Its documentary evidence consisted of its petitions before the Grand Court of the Caymans, the letters to the branches requesting assistance and a chart comparing the documents produced on December 5, 1983, with those produced on January 25, 1984.

We had ordered the parties to present evidence to the district court of the letter agreement between both countries first mentioned to us during oral argument in December. The Bank introduced these letters, known as the "Gentlemen's Agreement", which reflected the results of a meeting between the Cayman Islands and the United States held in Miami in September, 1982. After the meeting, Acting Governor of the Caymans, D.H. Foster, wrote a letter to Michael Carpenter, the Consul General of the United States in Jamaica, outlining the necessary steps to be followed by the United States when requesting information protected by the confidentiality laws of the Caymans. Requests for assistance would be

> 1) initiated through the office of International Affairs of the United States Department of Justice;
>
> 2) directed to the Cayman Islands Commissioner of Police and supported by documentary evidence and affidavits sufficient to establish that the requests were in connection with inquiries into an offense made criminal by both the laws of the United States and the Cayman Islands, with tax offenses specifically excluded;
>
> 3) received by the Police Commissioner who would first determine whether a *prima facie* case was evident and if so would be referred to a committee consisting of the Attorney General, the Financial Secretary, a senior mem-

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10 Mr. Hill has been employed by the United States Department of Justice since 1982 to represent its interests in the Bahamas.

ber of the police force and an elected member of the Executive Council;

4) examined by that Committee and forwarded with a recommendation to the Governor in Council for presentation to the Council at its next weekly meeting;

5) reviewed by the Governor in Council, and if the recommendation of the Committee were approved, the Governor would authorize the confidential information or records to be obtained for the Governor in Council; and the information

6) forwarded through the Police Commissioner to the United States Office of International Affairs after perusal by the Governor in Council.

Foster predicted the information would be produced within one month of the request.[11] He concluded his letter by saying: "I should be obliged for confirmation that this is your Government's understanding. . . ."

The United States Government never confirmed the agreement. Instead, Deputy Assistant Attorney General, Roger M. Olsen, wrote a letter dated January 11, 1983, to its Excellency, G.P. Lloyd, C.M.G., Governor of the Cayman Islands stating:

> . . . I do wish to reiterate that while we are willing to try out the proposed procedures, the United States retains the option of relying on other legal processes available to us in gathering evidence. Such processes include our seeking the issuance of orders from our own courts commanding the production of evidence from persons or institutions in our territory.
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> . . . [W]e do have several reservations about whether the proposed procedures satisfactorily address both our Governments' needs.

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11 John Harris stated in his affidavit that "no bank records have ever been received in any case by the United States in the fourteen months that the informal agreement has been under experiment. . . ."

In response to Mr. Olsen's letter, Governor Lloyd wrote a letter to Mr. Carpenter on March 15, 1983. The Governor stated that "even though no confirmation had been received from your Government as to the agreed procedures, they would be implemented by us."

The *amici* all filed extensive briefs with the district court. At the hearing they very briefly presented their views to the court on the diplomatic ramifications of the case. *Amici* offered no evidence whatsoever. On February 28, 1984, the district court issued its order, reaffirming its conclusion that the enforcement of the grand jury subpoena was proper and that the Bank had not acted in good faith. The court found the total fine due and owing the United States to be $1,825,000.00.

The Bank challenges the district court's contempt order by claiming that it made a good faith effort to comply with the court's orders in its search for the requested documents. It also asserts that both the diplomatic agreements between these countries and the act of state doctrine require reversal of the court's contempt order and fine. We disagree.

II. *PRODUCTION OF DOCUMENTS*

A. Lack of Good Faith

The Bank of Nova Scotia was served with a subpoena from the grand jury on March 4, 1983. The Bank produced no documents at its March appearance before the grand jury and instead moved to quash the subpoena. The district court gave the Bank two months to search for the documents and ordered production by May 31, 1983. Instead of trying to comply with the district court's order during this time the Bank spent most of its time corresponding through counsel with the Assistant United States Attorney handling the case. The Bank insisted that the government send letters rogatory and show the materiality and necessity of the requested documents to the investigation. Neither of these is a prerequisite to the enforcement of a grand jury subpoena in our legal system.

Under our system of jurisprudence the grand jury's function in investigating possible criminal violations is vital. In re

Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied sub nom*, Bank of Nova Scotia v. United States, ____ U.S. ____, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983); In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976). The Supreme Court has stated that the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279-281, but essential to its task." Branzburg v. Hays, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626, 643 (1972). Since the ability to obtain evidence is crucial to all criminal justice proceedings, courts have repeatedly allowed the grand jury wide discretion in seeking evidence. *See*, United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

It would be extremely unwise for us to unduly restrict the broad investigatory powers of the grand jury by first requiring that the government show necessity or issue letters rogatory. Letters rogatory are not equivalent to a grand jury subpoena. *See*, United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981). We have clearly stated that the government is not required to show the relevancy of the requested documents to a grand jury investigation,[12] In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d at 1387; In re Grand Jury Proceedings, United States v. Guerrero, 567 F.2d 281 (5th Cir. 1978); In re Grand Jury Proceedings, United States v. McLean, 565 F.2d 318 (5th Cir. 1977),[13] and we have repeatedly

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12 We are all aware that the Third Circuit in its holdings in In re Grand Jury Proceedings, (Schofield I) 486 F.2d 85 (1973) and In re Grand Jury Proceedings, (Schofield II), 507 F.2d 963, *cert. denied*, 421 U.S. 1015, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975) has imposed a relevancy requirement but we have already stated that we refuse to impose such a restriction. In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384, 1387 (11th Cir. 1982). We join the other circuits that have declined to adopt such a rule. *See, e.g.*, In re Pantojas, 628 F.2d 701 (1st Cir. 1980); In re Liberatore, 574 F.2d 78 (2d Cir. 1978).

13 Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding upon this court unless and until they are overruled by

declined requests to overturn this rule. In re Grand Jury Proceedings, United States v. Nigel Bowe, 694 F.2d 1256, 1258 (11th Cir. 1982); In re Slaughter, 694 F.2d 1258, 1260 (11th Cir. 1982). As noted by the Supreme Court:

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.

United States v. Dionisio, 410 U.S. at 17, 93 S.Ct. at 773.

The district court correctly concluded that the Bank failed to exercise good faith in its efforts to comply with the subpoena. All the Bank tried to do in this case was to obtain from the government what it was clearly not entitled to receive; a showing of materiality and necessity and the issuance of letters rogatory. The district court specifically ruled that letters rogatory were not required yet the Bank continued to write to the prosecutor requesting him to send letters rogatory. Nothing was substantially done by the Bank until the $25,000 per day fine imposed by the district court started to accumulate.

The documents actually produced at different times virtually speak for themselves in showing lack of good faith. On October 20, 1983, seven months after the grand jury subpoena had been served, the only document produced by the Bank was a xerox copy of a draft drawn to Paula Brady for $163,892.33. The Assistant United States attorney advised Bank's counsel that there were many more documents in existence which were responsive to the subpoena. Nevertheless, the Bank blithely ignored these warnings and on November 14, 1983, tendered copies of the documents relating to that one transaction as the only records in the Bahamian branches called for by the subpoena. The prosecutor once more warned the Bank that he considered the production inadequate. The Bank insisted that they had diligently searched all ten branches in the Bahamas and had produced all documents. On November 17, 1983, the

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the Eleventh Circuit sitting *en banc*. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

Bank turned over all of its records from the Cayman Islands. The IRS agent working on the case once more warned Bank's counsel that there were many more documents sought by the subpoena which the Bank had not produced.

Having chosen to ignore all warnings until the fine had started to accumulate, the Bank belatedly became concerned and ordered Mr. Nicol, in late November, 1983, to go to the Bahamas and insure that an effective search had been carried out. Nicol's search began in obvious places which had been previously ignored or overlooked. As a result of his efforts numerous additional documents were discovered at two of the Bank's Bahamian branches. Nine months after the original service of the subpoena, on December 5, 1983, the Bank produced photocopies of voluminous records from 1979. While examining the original documents from the December fifth turnover Mr. Nicol discovered that there were other documents which obviously still were missing. He requested another search of the box of records and obtained the missing documents. These documents were produced on January 25, 1984.

The flurry of activity undertaken by the Bank to discover documents after the trial court entered its order of contempt cannot save the Bank from the consequences of its previous extensive pattern of delay. *See, e.g.*, United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). It is clear that the Bank had ample time to search its records and fully comply with the grand jury subpoena at least between April 27, 1983, when the trial court first ordered compliance, and November 14, 1983, when the fines began accumulating. The fact that the Bank at first may have believed erroneously that Bahamian law precluded disclosure, does not excuse the Bank's failure to perform a diligent search upon receipt of the trial court's order of enforcement. If the Bank had done so, it would have been able to avoid the fine with respect to the Bahamian documents by producing them all, rather than just a small fraction of them, on November 14, 1983.

B. Balancing Competing Interests

The Bank also asserts that compliance with the United States grand jury subpoena would require it to violate the Cayman Islands secrecy laws.[14] It therefore contends that it would be appropriate for the United States to moderate the exercise of its judicial enforcement powers in this case since the conflicting laws impose inconsistent obligations on the Bank. The district court, balancing the several factors enumerated in Section 40 of the Restatement (Second) of Foreign Relations Law of the United States (1965), properly concluded that enforcement of the subpoena was proper.

Section 40 provides:

> Limitations on Exercise of
> Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of

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14 Most of the arguments raised by the Bank and *amici* challenge the contempt order against the Bank for failure to produce records from the Cayman Islands yet almost the entire fine imposed is attributable solely to the Bank's delayed production of records from the Bahamas. The Bank does not contest the validity of the underlying contempt order as it applies to the refusal to produce the documents from its Bahamian branches so we will discuss only the Cayman records.

> either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Restatement (Second) of Foreign Relations Law of the United States (1965).

The first Restatement factor is the relative interest of the states involved. In this case, the United States seeks to obtain information concerning the money transactions of individuals who are the target of a narcotics investigation. Stemming the narcotics trade has long been a concern of paramount importance to our nation. Congress has steadily enlarged the means available for the detection, prosecution and punishment of those who violate the narcotics laws of this country. Gore v. United States, 357 U.S. 386, 390, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958). Illegal narcotics trade generates enormous amounts of cash. Tracing the flow of these dollars is indispensable to this nation's efforts to stop the narcotics trade. Congress, as well as the Executive Branch, has long been "concerned about [the] serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax and regulatory enactments." California Bankers Ass'n v. Shultz, 416 U.S. 21, 27, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974). *See also*, H.R. Rep. No. 91-975, 91 Cong. 2d Sess. 12 (1970), U.S. Code Cong. & Admin. News 1970, 4394, 4397.

The Cayman Islands, on the other hand, sees preservation of bank secrecy as vital to the expansion of the Island's principal industry-banking and off-shore finance. Yet the law does not operate as a blanket guarantee of privacy and has many exceptions.[15] As the Court of Appeal in Jamaica has stated:

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15 Disclosure may be made whenever authorized by the Grand Court, or "in the normal course of business," or with the "express or implied consent" of the "relevant principal," or "by or to" a constable investigating offenses in the jurisdiction, or "by or to" a constable investigating certain offenses alleged to have been committed abroad, or "by or to" the Financial Secretary, the Inspector or anyone else authorized by the Governor, or "by or to" a professional person where

> It would therefore appear that the policy of the legislature is that the Confidentiality Laws of the Cayman Islands should not be used as a blanket device to encourage or foster criminal activities . . . . [T]here is nothing in the statute to suggest that it is the public policy of the Cayman Islands to permit a person to launder the proceeds of crime in the Cayman Islands, secure from detection and punishment.

In re Confidential Relationships (Preservation) Law, United States v. Carver, (Jamaica Ct. App. 1982) (Joint Brief of the United Kingdom and the Cayman Islands, Appendix L). Furthermore, even if the Cayman Islands had an absolute right to privacy, this right could not fully apply to American citizens. The interest of American citizens in the privacy of their bank records is substantially reduced when balanced against the interests of their own government engaged in a criminal investigation since they are required to report those transactions to the United States pursuant to 31 U.S.C. § 1121 and 31 C.F.R. § 103.24 (1979).[16] United States v. Payner, 447 U.S. 727, 732 and n.4, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980).

We agree with the district court that the Bank suffered no hardship as a result of inconsistent enforcement actions. The Bank and the *amici* argue that it is unfair to require the Bank to be put in the position of having to choose between the conflicting commands of foreign sovereigns. Yet such occasions will arise and a bank indeed will have to choose. As we

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"necessary for the protection of himself or any other person against crime," or in accordance with the provisions of "any other law." Confidential Relationships (Preservation) Law § 3. The statute does not restrict the power of the Grand Court in ruling upon applications. In a criminal case for which an application for disclosure is made, the judge is merely instructed to "have regard to" the "interests of justice." *Id.* § 3A(6)(c).

16 The interest of the Cayman Islands in protecting the privacy of bank customers is also diminished here since the investigating body is a federal grand jury which is required by law to maintain the secrecy of its proceedings. *See*, United States v. Vetco, 644 F.2d 1324, 1331 (9th Cir. 1981); Fed. R. Crim. P. 6(e).

stated in In re Grand Jury Proceedings United States v. Field, 532 F.2d 404, 410 (5th Cir.), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976):

> In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.

Consideration of the other factors set forth by the Restatement does not alter our conclusion that the district court properly enforced the subpoena and imposed contempt sanctions. The disclosure to the grand jury would take place in the United States. The foreign origin of the subpoenaed documents should not be a decisive factor.[17] The nationality of the Bank is Canadian, but its presence is pervasive in the United States.[18] The Bank has voluntarily elected to do business in

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17 The Government of Canada vigorously asserted that the situs of the records is of utmost significance and that, absent extraordinary circumstances, the law of the jurisdiction must prevail. This position is advanced only in a tentative draft of the revised Restatement and does not reflect the current law of the United States. *See, e.g.*, In re Grand Jury Proceedings, The Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982); United States v. Field, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976). The position advanced by the tentative draft has been explicitly rejected by the State Department. *See, e.g.*, Compelling Discovery and Evidence in International Litigation, Address of Honorable Davis R. Robinson, The Legal Advisor, U.S. Department of State before the Association of the Bar of the City of New York (February 14, 1984).

18 The Bank of Nova Scotia has branches in Boston and Portland, agencies in Atlanta, Miami, New York and San Francisco, representative offices in Chicago, Cleveland, Houston, and Los Angeles, and a wholly-owned subsidiary, Bank of Nova Scotia Trust Company of New York.

numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions. It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations. As the Second Circuit noted years ago, "If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom." First National City Bank of New York v. Internal Revenue Service, 271 F.2d 616, 620 (2d Cir. 1959), *cert. denied*, 361 U.S. 948, 808 S.Ct. 402, 4 L.Ed.2d 381 (1960).

Enforcement of the subpoena is consistent with the grand jury's goals of investigating criminal matters. It is also entirely consistent with the Cayman policy against the use of its business secrecy law "to encourage or foster criminal activities." In the Matter of Proceedings Pending in the United States District Court for the District of Columbia between United States of America and Ray R. Carver, et al., (Ct. of Appeal, Jamaica 1982) quoted in Joint Brief of the United Kingdom and the Cayman Islands at 26-27. We conclude that enforcement of the subpoena and the sanctions imposed in this case are proper under the balancing approach of Section 40.

III. *THE GENTLEMEN'S AGREEMENT*

Amici, United Kingdom and the Cayman Islands, contend that the subject subpoena should not be enforced because the United States is bound to follow the procedure developed as a result of a September 27, 1982, meeting and exchange of letters between the United States and Cayman Islands. The *amici* assert that this new procedure, called the gentlemen's agreement, was a precondition to enforcement of the grand jury subpoena. After considering the briefs and arguments of the parties and *amici*,[19] and reviewing the uncontroverted affidavits of the United States the district court found:

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19 Although the *amici* were very verbose in their briefs we were surprised that they presented no documents or evidence to the district

> [The letters exchanged between the United States and Cayman Islands] do not constitute any formal inter-governmental agreement. While the Cayman government may have manifested an intent to be bound to the agreed procedures, the United States government clearly did not. Additionally, the Cayman Governor was not under the impression that the United States intended to be bound by the procedures.

Supp. Record at 346.

Based upon this finding, the district court concluded:

> The letter agreements did not result in and in and of themselves do not constitute a contract by which the United States is bound. Even if the "gentlemen's agreement" was binding, it would not have required any course of action different from that which the government took in this case. By its terms, it did not require the government to resort first to the outlined procedures or to forfeit the prerogatives of the United States Attorney with respect to grand jury investigations. The "gentlemen's agreement" was not a means by which this Court could have properly required the government to reveal to the Bank or the Cayman government the materiality and necessity of the subpoenaed documents to the grand jury investigation. In other words, the government did not bargain away its rights under *McLean* [565 F.2d 318] and its progeny to maintain the secrecy of the investigation.

The district court's interpretation of the gentlemen's agreement procedure is the only rational interpretation supported by the record. The testimony and the letters reveal only preliminary negotiations with a hope of reaching a definite agreement in the future.[20] The March 15, 1983, letter from Governor

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court when dealing with the serious legal questions involved in this case.

20 Deputy Assistant Attorney General Roger Olsen's affidavit avers that it "would have been in direct contradiction to the authority

Lloyd to Consul General Michael Carpenter makes this clear. Governor Lloyd clearly indicated the decision of the Cayman Islands to implement the working procedures even though no confirmation had been received from the United States as to the procedures. It is clear from the evidence presented to the district court that this exchange of letters was not a binding, enforceable agreement but rather an experimental and tentative alternative for the production of documents.

Further, the gentlemen's agreement did not purport to limit the existing law enforcement investigatory methods used by the United States—such as the grand jury subpoena. On the contrary, each of the United States witnesses refuted this assertion. Government's Exhibits 2, 3 and 4. The January 11, 1983, letter from Deputy Assistant Attorney General Roger Olsen to Governor Lloyd, specifically rejected any such interpretation by stating:

> However, I do wish to reiterate that while we are willing to try out the proposed procedures, the United States retains the option of relying on other legal processes available to us in gathering evidence. Such processes include our seeking the issuance of orders from our own courts commanding the production of evidence from persons or institutions in our territory.

Government Exhibit 3A.

Finally, the mechanism set forth in the gentlemen's agreement is not even applicable where the United States is concurrently investigating tax and narcotics laws violations. Governor Lloyd informed Michael Carpenter that "it is only fair to say that I do foresee difficulty [in] the type of case which is clearly criminal but also has tax prosecution possibilities." Joint Brief of the United Kingdom and the Cayman Islands, Appendix Y-2). Since the grand jury investigation in this case concerned

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granted to me and our delegation" to enter into a binding agreement on September 27, 1982. Government Exhibit 3 at 5. *Amici* did not controvert this assertion.

both tax and narcotics violations it is clear that the gentlemen's agreement procedure was not applicable.[21]

The gentlemen's agreement procedure is a far cry from constituting a substantially equivalent alternative to a grand jury subpoena. The agreement represents nothing more than an understanding that informal requests for assistance would now be channeled between the Justice Department's Office of International Affairs and Cayman's Commissioner of Police. As Deputy Assistant Attorney General Olsen asserted, it would "violate good sense and reason" to forego the use of the subpoena power in these circumstances. Government Exhibit 3 at 5.

IV. *THE SINGLE CONVENTION ON NARCOTIC DRUGS*

Amici, United Kingdom and the Cayman Islands, also contend that the subject subpoena is void because it was issued contrary to the provisions of the Single Convention on Narcotic Drugs, 1961. The district court concluded that:

> The Single Convention on Narcotic Drugs, 1961. 18 U.S.T. 1409, TIAS 6298, New York, March 30, 1961, ratified by the United States 1967, does not control the conduct of the parties to this case. It cannot be interpreted to require that the government make a showing of materiality and necessity to a party or issue letters rogatory when seeking to obtain documents located in another party's jurisdiction. It does not restrict the grand jury subpoena power. It does not contain exclusive means for the exchange of information between parties. *Cf.*, *Vetco*, *supra*, 691 F.2d at 1285-1286.

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21 It is also important to note that the informal procedure has not resulted in the expeditious production of bank records. John Harris stated that as of February 14, 1984, "no bank records have ever been received in any case by the United States in the fourteen months that the informal agreement has been under experiment, even though access to such evidence was one of the central aims of our discussions." Government Exhibit 4 at 7-8.

Supplemental Record at 350-351.
We agree.

The primary purpose of the Convention was to simplify and rationalize the numerous existing treaties on the international control of production and commerce in narcotic substances. Its ultimate goal was to eliminate illicit drug trafficking. *See generally*, Cohrrsen and Hoover, The International Control of Dangerous Drugs, 9 J. Int. L. and Econ. 81, 83-85 (1974); Lande, The Single Convention on Narcotic Drugs, 1961, 16 Int'l Org. 776 (1962).

To effectuate this goal, Article 35, entitled "Action against the illicit traffic", provides for cooperation by the signatory countries, "having due regard to their constitutional, legal and administrative systems." Under Article 36, the parties agree to provide criminal penalties for any drug transactions which are contrary to the provisions of the convention. The obligation of each party to provide these penalties is subject to the constitutional limitations and the legal system and domestic law of each signatory country. Thus, it is clear that the drafters of the Convention wanted to ensure that it was sufficiently flexible so as to be generally acceptable.

In *In re Baird*, 668 F.2d 432 (8th Cir.), *cert denied*, 456 U.S. 982, 102 S.Ct. 2255, 72 L.Ed.2d 860 (1982), the court recognized that the Single Convention did not impair the investigatory powers granted to the grand jury under United States law. Similarly, in In Re Nigro, 555 F. Supp. 65 (D. Colo.), *aff'd*, 705 F.2d 1224 (10th Cir. 1982), *cert. denied sub nom*, ____ U.S. ____, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983), the court protected the integrity of the grand jury process by emphasizing that the Single Convention would not require the abrogation of the grand jury secrecy rule, and held that an immunized witness could be compelled to testify despite an alleged fear of foreign prosecution. These cases clearly establish that a country's obligations to cooperate under the Single Convention are governed by its own domestic law. The only logical interpretation of the Single Convention vis-a-vis existing law enforcement techniques is that the Single Convention was intended to

encourage the expansion of available mechanisms for obtaining relevant information. It cannot be interpreted in a way that hinders, rather than aids, the enforcement of drug trafficking laws. United States v. Liles, 670 F.2d 989 (11th Cir.), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2300 (1982); United States v. Richardson, 580 F.2d 946 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068, 99 S.Ct. 835, 59 L.Ed.2d 33 (1979).

The existence of the Single Convention on Narcotic Drugs does not require any greater deference to foreign law than that already recognized in the balancing test set forth in the Restatement. The requirement of international cooperation in Article 35 permits the United States to cooperate with "due regard" to its own legal system. The well-established legal system of the United States permits enforcement of grand jury subpoenas under the circumstances of this case. The Single Convention neither requires the United States to forego this method of obtaining records nor does it require the Cayman Islands to defer to it. The existence of the Single Convention does not restrict the grand jury's power in this case.

V. *THE ACT OF STATE DOCTRINE*

Only the United Kingdom asserts that the act of state doctrine should be applied here to thwart the efforts by the Executive Branch to obtain records in furtherance of a grand jury investigation into conduct crossing our nation's boundaries. The doctrine is completely inapplicable to this case. The act of state doctrine is primarily designed to avoid impingement by the judiciary upon the conduct of foreign policy by the Executive Branch. It is aimed at preventing judicial interference with the conduct of foreign relations by questioning the validity of the acts of foreign sovereigns in the context of a civil suit.[22] The doctrine is not required by considerations of sovereignty, international law or the Constitution. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27, 84 S.Ct.

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22 As Commentary j to Restatement § 41 notes, the act of state doctrine is a variant of "conflict of law rules" for "settlement of civil litigation of a private nature."

923, 11 L.Ed.2d 804 (1964); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 605 (9th Cir. 1976). Instead the doctrine "derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government." Timberlane Lumber Co. v. Bank of America, 549 F.2d at 605.

The Restatement's definition of the rule renders it completely inapplicable in the investigatory or criminal context:

> Except as otherwise provided . . . a court in the United States, having jurisdiction . . . to determine a claim asserted against a person in the United States or with respect to a thing located there, or other interest localized there, will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests.

Restatement (Second) Foreign Relations Law of the United States § 41 (1965).

It is also inapplicable in this case because the Cayman Grand Court purported to control conduct in the United States by blocking compliance with the grand jury subpoena, whereas the classic formulation of the doctrine is set forth in Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897) as follows:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

The district court correctly concluded that the doctrine had no application to this case.[23] The district court pointed out that

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23 The court also pointed out that even if we were to assume that the act of state doctrine applied, this case would fall within the *Sabbatino* exception. The court stated:

> [T]here was no danger in this case that enforcement of the subpoena would inpinge upon fundamental matters committed by the Constitution to other branches of government. The branch of

it never "passed upon the validity of any act of a foreign state before issuing the April 27 order denying the Bank's motion to quash the subpoena and directing the Bank to comply with the subpoena." Supp. R. at 351. The court also never conducted an inquiry into the validity of a public act of a foreign sovereign. United States law does not require blindly giving effect to the act of a foreign sovereign without "having due regard . . . to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

We have previously recognized that international friction is provoked by enforcement of subpoenas such as the one in this case. In re Grand Jury Proceedings United States v. Bank of Nova Scotia, 691 F.2d at 1388. But under our tripartite form of government federal courts remain open to the legislative and executive branches for assistance if matters such as this prove to have international repercussions. *See, e.g.*, United States v. First National City Bank, 379 U.S. 378, 384-85, 85 S.Ct. 528, 531-32, 13 L.Ed.2d 365 (1965). The grand jury is a centuries-old, common law institution which is vital to our system of government. It has both the right and the duty to inquire into the existence of possible criminal conduct. Branzburg v. Hayes, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). Indispensable to the exercise of its power is the authority to require the production of evidence. United States v. Mandujino, 425 U.S. 564, 571, 96 S.Ct. 1768, 1774, 48 L.Ed.2d 212 (1976). The district judge in this case was extremely patient. He gave the Bank ample chances to comply with the subpoena. But the Bank was just sloppy in its search. The remedy for violation of the district court's order is civil contempt. The imposition of a coercive fine is not improper, In

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government to which these matters of foreign policy are committed is the same branch seeking (and obtaining) enforcement of the subpoena. The court in *Sabbatino* observed that '. . . when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen. . . .' *Id.* at 857-858.

re Grand Jury Impaneled January 21, 1975, 529 F.2d 543, 550-51 (3d Cir.), *cert. denied sub nom*, Freedman v. United States, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976), and will be reversed only for an abuse of discretion. *See*, *e.g.*, United States v. Flores, 628 F.2d 521, 527 (9th Cir. 1980). The order of contempt and the fine in this case did not constitute an abuse of the district court's discretion.

AFFIRMED.

APPENDIX B

Order of the
United States District Court
for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

BANK OF NOVA SCOTIA

Case No. 83-1(WPB) GJ

United States District Court,
S.D. Florida.

February 28, 1984

This cause came before the Court on the order of remand from the United States Court of Appeals for the Eleventh Circuit, issued December 28, 1983, *In re Grand Jury Proceedings, United States v. The Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983) (hereinafter referred to as "Bank of Nova Scotia II"), and on the United States' motion for judgment and assessment of fine, filed on or about January 25, 1984.

Following a review of the order of remand, this Court issued an order on January 6, 1984 inviting the litigants and interested parties to file submissions addressing the issues raised in the appellate court opinion. Leave to appear as *amicus curiae* was granted to the Government of Canada, the Canadian Bankers' Association and the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands. The litigants and

amici made submissions and appeared at a hearing conducted on February 14, 1984.

Generally, the Eleventh Circuit remanded this cause for this Court to accomplish two objectives: one objective is to provide the Eleventh Circuit with a complete factual record, especially concerning the events that occurred during the pendency of the appeal, but also including any information that this Court *should* have had before issuing the contempt order. The other is to hear the views of the amici. Accomplishing these objectives entails a complete reconsideration of the actions taken by this Court in this case, in view of the newly submitted information. In an attempt to aid appellate review, set forth below are the findings of fact and conclusions of law reached by this Court in this case, in accordance with Fed.R.Civ.P. 52(a). *See*, 5A *Moore's Federal Practice*, § 52.06[1] at 2706 (2d ed. 1980).

A. Findings of Fact

1. The Bank of Nova Scotia (hereinafter referred to as the "Bank") is a Canadian banking corporation, headquartered in Toronto, with an agency in Miami and branches in the Bahamas and the Cayman Islands.

2. The executive branch of the United States is represented in this litigation by the United States Attorney for the Southern District of Florida.

3. On March 1, 1983, federal Grand Jury 83-1, sitting in West Palm Beach, Florida, issued a subpoena *duces tecum* to the Bank requesting documents maintained by the Bank at its branch offices in the Bahamas, the Cayman Islands and the Lesser Antilles.[1] The subpoena was served on the Bank's Miami agency on March 4, 1983 and was initially returnable on March 29, 1983.

4. On March 22, 1983, the Miami agency sent telexes informing the Bahamian and Cayman branches of the subpoena.

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1 The litigants have stipulated that no bank records named in the subject subpoena exist in the Bank's branch in Antigua, Lesser Antilles. There is no concern, then, with this branch.

On March 23, 1983, counsel for the Bank, William E. Sadowski, Esq. (hereinafter referred to as "Sadowski") wrote a letter to the Assistant United States Attorney handling this matter, Thomas A. Blair, Esq. (hereinafter referred to as "Blair"), requesting *inter alia* ". . . a sworn statement regarding the nature of the evidence sought by the subpoena and its relation to the investigation."

5. An agent for the Bank appeared before the Grand Jury on March 29, 1983 and declined to produce the subpoenaed documents.

6. On April 4, 1983, the Bank moved to quash the subpoena, or alternatively, for an order:

> 1. Granting The Bank additional time to respond to the subpoena and, in particular, to pursue available avenues for obtaining the permission of foreign governments (of the Bahamas and Cayman Islands) to disclose customer information.
>
> 2. Containing explicit and detailed findings relative to the materiality and necessity of the subpoenaed documents to The Grand Jury's investigation for the use by The Bank to support an application to the Grand Court of the Cayman Islands for permission to disclose subpoenaed documents which may be located in The Bank's Cayman Islands Branch.
>
> 3. Directing the United States Government to provide assistance to The Bank in foreign jurisdictions.
>
> 4. Directing the United States Government to provide The Bank with an affidavit or other comparable document setting forth the materiality and necessity of the subpoenaed documents to the Grand Jury's investigation for use by The Bank in support of its application to the Grand Court of the Cayman Islands for permission to disclose subpoenaed documents which may be located in The Bank's Cayman Islands branch.
>
> 5. Directing the United States to issue letters rogatory to the Commonwealth of the Bahamas requesting that the

Bahamas permit The Bank to disclose the subpoenaed documents.

7. On April 27, 1983, this Court issued an order denying the Bank's motion to quash and 1) granting the Bank additional time to respond to the subpoena, 2) declining the request to require the government to set forth the materiality and necessity of the subpoenaed documents to the Grand Jury investigation (and by implication, the request to this Court to make "explicit and detailed findings relative to the materiality and necessity of the subpoenaed documents"), 3) declining the request to require the government to forward letters rogatory but 4) requiring the government to provide "any reasonable assistance" to the Bank. Furthermore, that order clearly required the Bank to comply with the subpoena.

8. In a letter dated May 2, 1983 from Sadowski to Blair, the Bank requested 1) "an affidavit or other evidence which would establish the materiality of the documents being sought to the investigation being conducted by the Grand Jury" to assist the Bank's application for a judicial waiver under the Cayman bank secrecy law and 2) the issuance of letters rogatory in order to obtain the documents located at the Bahamian branch. Blair responded in a letter to Sadowski dated May 5, 1983 that "the present investigation involves apparent violations of both the tax and narcotics law of the United States" and that "we are specifically declining to send letters rogatory to the Bahamian and Cayman governments."

9. Other correspondence between Sadowski and Blair during May, 1983 was essentially similar: The Bank requested the government to provide a showing of the materiality and necessity of the subpoenaed documents to the Grand Jury investigation and the government refused.

10. On May 27, 1983, the Bank made its first application in the Grand Court of the Cayman Islands for permission to disclose the subpoenaed documents. That application contained a copy of this Court's April 27th order. Thus, the Grand

Court was aware that 1) this Court ordered the Bank to comply with the subpoena and that this Court declined the Bank's request to order the government to show materiality and necessity or to issue letters rogatory. In the face of an order of this Court directing production of the subpoenaed documents, the Grand Court issued an order on May 31, 1983 prohibiting such production. There is no evidence that the Bank appealed the Grand Court's May 31st order to the Court of Appeals of Jamaica.[2]

11. This Court conducted a hearing on June 1, 1983. At that time, the Bank had yet to comply with the subpoena. Again, the Bank requested an order directing the government to provide a showing of materiality and necessity. And again, the Bank sought an order containing findings relative to the materiality and necessity of the subpoenaed documents to the Grand Jury investigation. The Bank's counsel expressed uncertainty as to whether the requested showing and findings would be sufficient for the Cayman Court.

> THE COURT: You think the courts down there might respond to a finding on the part of this Court there is materiality, and relevancy, or you think they are going to have to have the bare evidence themselves on which to make that determination?
>
> MR. SADOWSKI: Your honor, I don't know; and frankly, we have sessions where a bunch of us will sit down and try to come up with areas that we can get. We understand we have a reticent government, and we can understand the hesitancy to get involved with these things. It is hard enough to deal with the Federal court system. If we get an affidavit from the government which is less detailed,

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2 "As a matter of convenience appeals from the Georgetown [Cayman] Grand Court still lie to the judiciary in Jamaica . . . ." N. Williams, *A History of the Cayman Islands* at 86 (1970) *quoted in* Joint Brief of the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands as Amici Curiae, served on January 25, 1984, at 24 (hereinafter referred to as "Joint Brief").

> provides less detail than the five statewide grand jury affidavit, but if we were able to couple that with an order from your Honor finding, indeed sort of under the Schofield cases, finding there is—the documents requested are material and necessary to the grand jury's investigation, and as much in addition to that as your Honor could by way of specific facts found and everything, it would give us something to argue from, and I would think it would have to be—have some persuasive effect on the Grand Court. It has not been done, to my knowledge.

The government's position was clear: it was willing to provide any requested assistance—short of showing materiality and necessity and sending letters rogatory.

> MR. BLAIR: The Government is declining to lay open its entire grand jury investigation for the purpose of proceeding in the foreign court. I do not believe that is what the Court intended in its order of April 27th. If there is anything specific we could do, we would be happy to do that, and I asked Mr. Sadowski to tell me what that might be, and he told me he needed letters rogatory in the Bahamas, and for the Caymans, extensive, inclusive affidavit showing materiality; and the Government's position is, if this Court doesn't feel that it can require the Government to make that showing here, I don't interpret your order of April 27th to compel us to make it in some foreign court. Perhaps I am reading your order wrong. I would be happy to be further instructed.

12. There is no evidence of any efforts taken by the Bank in the Bahamas or the Caymans during the time between the June 1st hearing and the October 20th contempt hearing.

13. On October 10, 1983, this Court again ordered the Bank to comply with the subpoena. In that order, this Court concluded that "the government has done all that it is required to do by law and by this Court's order of April 27, 1983 in connection with the enforcement of its subpoena."

14. The contempt hearing was held on October 20, 1983. At this hearing, the Bank offered into evidence the telexes mentioned in finding No. 4, *supra*, the exchange of correspondence between Sadowski and Blair mentioned in findings Nos. 4, 8 and 9, *supra*, a copy of the Cayman business secrecy law and the opinions of Cayman counsel regarding the application of that law. The Bank argued that its efforts of attempting to persuade the government to make a showing of materiality and necessity or to issue letters rogatory constituted good faith compliance with the subpoena. This Court concluded that "There is clear and convincing evidence that the Bank had not turned over the subpoenaed materials and thus, this Court finds the Bank in contempt of the order of October 10, 1983." A fine of $25,000 per day, effective October 26, 1983, was imposed to coerce the Bank to comply with the subpoena. That fine was stayed by the Eleventh Circuit from October 25 to November 14, 1983.

15. In response to a request by the Bank, this Court entered a supplemental finding on October 24, 1983. That finding was that the Bank had failed to persuade the Court that it had made a good faith effort to comply with the subpoena. As grounds for this finding, the order stated:

> The focus of the Bank's efforts has been to obtain from the government what it is clearly not entitled to receive: first, a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and secondly, the forwarding of letters rogatory. (*See* this Court's order of April 27, 1983 and the citations therein.) This Court has given the Bank more than adequate time to exhaust remedies available under Bahamian law and to seek other measures under Caymanian law; the exhibits offered into evidence at the October 20th hearing indicated no such efforts past early June, 1983.

16. At the hearing conducted on February 14, 1984, the Bank offered no new evidence of any efforts aimed at complying with the subpoena before October 20th.

17. On November 11, 1983, the Attorney General of the Bahamas concluded that, where the Bahamian branch did not have an account relationship with the subject of the subpoena, the dealings of the parties in the Bahamas did not constitute a customer relationship, so that the documents found in the Bahamas were not protected by the Bahamian bank privacy statute. There is no indication in the record as to if and when the Bank first sought this interpretation by the Attorney General, why this interpretation was not sought earlier or why this conclusion could not have been reached by the Bank itself after a review of the subpoena, the Bank's account records and the relevant portions of the Bahamian law.

18. Bank officials conducted four searches for documents located in the Bahamas on March 11, 1983, April 14, 1983, November 14, 1983 and November 24, 1983. Documents found during these searches were produced to the Grand Jury on November 14, 1983, December 5, 1983 and January 25, 1984. The documents produced on January 25th are significantly different from any documents produced earlier. They are not merely copies of earlier produced documents.

19. On November 11, 1983, the Grand Court of the Caymans reconsidered the issue of disclosure but again refused to permit the Bank to disclose the records.

20. On November 17, 1983, the Governor of the Cayman Islands authorized the disclosure of the subpoenaed documents. This action was taken pursuant to Section 3(2)(b)(iv) of Cayman's Confidential Relationships (Preservation) Law, which provides in part:

> (2) This Law has no application to the seeking, divulging, or obtaining of confidential information—. . .
>
> (b) by or to—. . .
>
> (iv) . . . , in relation to particular information specified by the Governor, such other person as the Governor may authorize.

Although this type of authorization was without precedent in Cayman law, the Bank considered making a request to the Governor under this provision but never did so. During direct examination at the February 14th hearing, Cayman counsel retained by the Bank with respect to this subpoena testified in response to the following questions:

> (by Mr. Newcomb)
>
> Q. The Bank ultimately received an order from the Governor and with the concurrence, apparently, of the Executive Council permitting disclosure of these documents. In your experience, has there ever been such an order previously issued?
>
> A. No, it was unprecedented.
>
> Q. And in your discussions with the Bank prior to that time when you rendered your opinion in October, did you anticipate that was an available road? Was there any opportunity for the Bank to apply for that kind of relief, shall I say?
>
> A. The question was raised but it is very difficult to tell exactly what section 32(b)(iv) was directed to. That is the subsection under which the authority was given and as it had never been used in this sort of instance before, *it was left as one of the options that the Bank could pursue with the Government of the Cayman Islands directly at that time*. (Emphasis supplied.)

No explanation has been offered for the Bank's failure to pursue this option.

21. On November 18, 1983, the Grand Court of the Cayman Islands issued an order permitting disclosure, pursuant to the action taken by the Governor.

22. All of the documents located at the Cayman branch were produced to the Grand Jury on November 17, 1983.

23. Evidence of the "letter agreements" referred to in the appellate court opinion, *Bank of Nova Scotia II*, *supra*, 772 F.2d at 658, and frequently referred to by the parties at the

February 14th hearing as the "Gentlemen's Agreement", was received into evidence at the February 14th hearing. It consisted of the following:

a. Government's Exhibit 4-A.

On September 13, 1982, Michael Carpenter, Consul General of the United States, wrote a letter to its Excellency, G.P. Lloyd, C.M.G., Governor of the Cayman Islands. In that letter, a meeting between appropriate representatives of the United States and the Cayman Islands was scheduled. As to the purpose of the meeting, the letter said:

> The purpose of the discussions will be to establish workable procedures for channelling and considering United States' requests for information presently protected by Caymanian confidentiality laws. *There is no plan* to discuss amendments to those laws or *to enter upon negotiation of any formal inter-governmental agreement*. (Emphasis supplied.)

b. Government's Exhibit 2-A.

After the meeting, Acting Governor of the Caymans, D.H. Foster, wrote a letter dated October 5, 1983 to Michael Carpenter. The purpose of this letter was "formally to confirm the agreement of the Government of the Cayman Islands to the working procedures. . ." The letter then set forth six procedures, followed by this language: "I should be obliged for confirmation that this is your Government's understanding. . . ."

c. Government's Exhibit 2-B.

In response to Mr. Foster's letter, Deputy Assistant Attorney General, Roger M. Olsen, wrote a letter dated January 11, 1983 to Governor Lloyd. That letter said in part:

> The representatives of the United States Department of State and Department of Justice who attended that meeting have reviewed the letter, and we are happy to agree that the working procedures set out in Mr. Foster's letter are in accord with our understanding. *However, I do wish*

> *to reiterate that while we are willing to try out the proposed procedures, the United States retains the option of relying on other legal processes available to us in gathering evidence. Such processes include our seeking the issuance of orders from our own courts commanding the production of evidence from persons or institutions in our territory.*
>
> We share Mr. Foster's hope that the understanding will be of value in enabling our Governments to coordinate more closely in the battle against crime. However, we do have several reservations about whether the proposed procedures satisfactorily address both our Governments' needs. (Emphasis supplied.)

Mr. Olsen went on to express three concerns. He concluded by saying:

> For these reasons, I believe that it is very important that we sit down and discuss means of resolving these remaining outstanding issues. I suggest that these talks [take] place in Georgetown no later than the end of January, 1983.

d. Government's Exhibit 2-C.

In response to Mr. Olsen's letter, Governor Lloyd wrote a letter dated March 15, 1983 to Mr. Carpenter. Before replying to the concerns expressed by Mr. Olsen, the Governor stated:

> I am pleased to know that your Government shares the feeling of the Cayman Islands Government that the talks which were held in Miami late last year were very useful, and that both Governments are in accord on the working procedures agreed. As you are probably aware, we decided in the Cayman Islands, shortly after that meeting, that *even though no confirmation had been received from your Government as to the agreed procedures*, they would be implemented by us. We have already processed a number of requests through these channels and have forwarded the information released to the Senior Trial Attorney, U.S. Department of Justice. (Emphasis supplied.)

24. Government's Exhibits 4-A, 2-A, 2-B and 2-C do not constitute any formal inter-governmental agreement. While the Cayman government may have manifested an intent to be bound to the agreed procedures, the United States government clearly did not. Additionally, the Cayman Governor was not under the impression that the United States intended to be bound by the procedures.

B. Conclusions of Law

1. At the core of this litigation is the clearly stated rule in this circuit that the government is not required to show that documents sought by way of a grand jury subpoena are relevant to an investigation properly within the grand jury's investigation. *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982) (hereinafter referred to as "Bank of Nova Scotia I"). The Eleventh Circuit has repeatedly declined requests to overturn this rule. *In re Grand Jury Proceedings, United States v. Nigel Bowe*, 694 F.2d 1256, 1258 (11th Cir. 1982); *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982). The rationale for the rule was stated in *In re Grand Jury Investigation, United States v. McLean*, 565 F.2d 318 (5th Cir. 1977):

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773 (1973).

Id. at 320.

Coupled with the recognition that the role of a district court with respect to grand jury proceedings is limited, *United States v. Pabian*, 704 F.2d 1533, 1536-37 (11th Cir. 1983); *United States v. Eisenberg*, 711 F.2d 959, 964-965 (11th Cir. 1983), adherence to *McLean* and its progeny formed the premise upon which the court orders in this litigation were entered.

2. The issuance of letters rogatory is not the substantial equivalent to a grand jury subpoena. *See*, *Bank of Nova Scotia I*, *supra*, 691 F.2d at 1390-91; *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981).

3. This Court again concludes that the Bank failed to exercise good faith in its efforts to comply with the subpoena.

First, the reality of what the Bank sought to do in this case was to obtain what it was clearly not entitled to receive: first, a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and second, the issuance of letters rogatory. While the Bank's efforts were extensive, they were unreasonably taken in view of *McLean* and its progeny and this Court's order of April 27, 1983. Moreover, the argument made by the Bank before this Court is substantially the same as the argument that was explicitly rejected by the Eleventh Circuit in *Bank of Nova Scotia I*, *supra*, 691 F.2d at 1387.

4. As pointed out by the appellate in *Bank of Nova Scotia II*, 722 F.2d at 658, "The enforcement of such subpoenas requires the balancing of many factors including the national interests of the countries involved." Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) adopted in *In re Grand Jury Proceedings, United States v. Field*, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L. Ed.2d 309 (1976). Section 40 reads:

> Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

As to the first factor, the interest of the United States in furthering the investigatory function of the grand jury has been described as "vital". *Field*, *supra*, 532 F.2d at 407. The Cayman Islands, in its *amici* brief on remand, has provided great assistance to this Court in describing the interests of the Caymans in its business secrecy law, The Confidential Relationships (Preservation) Law.

> . . .[t]he Act embodies or evidences several complementary policies: (i) the individual's right to privacy under Cayman law, (ii) the facilitation and implementation of economic policies designed to sustain and expand the Islands' principal industry, i.e., banking and off-shore finance, (iii) a healthy demonstration of the right to self-determination and principles of self-government, and (iv) sovereign assertion of jurisdiction over its territory under principles of English common law.
>
> Moreover, the fundamental privacy interests protected by the Act reflect a deliberate domestic policy, whose intellectual and legal origins are as old as English law and the Cayman's retention of the British common law of bank confidentiality is firmly rooted in the Cayman and English constitutional order and the colonial tradition.

Joint Brief at 26.

This Court concludes that the interests of the Caymans may also be characterized as "vital".

As to the second factor, the Bank suffered no hardship in Cayman or Bahamian courts as a result of inconsistent enforcement actions.

As to the third and fourth factors, disclosure of the subpoenaed records took place in the United States. The national-

ity of the Bank is Canadian, although its presence is pervasive in the United States.

As to the last factor, enforcement of the subpoena is consistent with the grand jury's goals of investigating criminal matters. So too, it is entirely consistent with the Cayman policy against the use of its business secrecy law "to encourage or foster criminal activities." *In the Matter of Proceedings Pending in the United States District Court for the District of Columbia between the United States of America and Ray R. Carver, et al.*, (Ct. of Appeal, Jamaica 1983), quoted in Joint Brief at 26-27.

This Court concludes that enforcement of the subpoena is proper under Section 40.

5. The letter agreements did not result in and in and of themselves do not constitute a contract by which the United States is bound. Even if the "gentlemen's agreement" was binding, it would not have required any course of action different from that which the government took in this case. By its terms, it did not require the government to resort first to the outlined procedures or to forfeit the prerogatives of the United States Attorney with respect to grand jury investigations. The "gentlemen's agreement" was not a means by which this Court could have properly required the government to reveal to the Bank or the Cayman government the materiality and necessity of the subpoenaed documents to the grand jury investigation. In other words, the government did not bargain away its rights under *McLean* and its progeny to maintain the secrecy of the investigation.

6. The Single Convention on Narcotic Drugs, 1961. 18 U.S.T. 1407, TIAS 6298, New York, March 30, 1961, ratified by the United States 1967, does not control the conduct of the parties to this case. It cannot be interpreted to require that the government make a showing of materiality and necessity to a party or issue letters rogatory when seeking to obtain documents located in another party's jurisdiction. It does not restrict the grand jury subpoena power. It does not contain

exclusive means for the exchange of information between parties. *Cf.*, *Vetco*, *supra*, 691 F.2d at 1285-1286.

7. The Act of State doctrine, *see*, *Banco National De Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), has no application to this litigation. This Court never passed upon the validity of any act of a foreign state before issuing the April 27th order denying the Bank's motion to quash the subpoena and directing the Bank to comply with the subpoena. For that matter, this Court never conducted an inquiry into the validity of a public act of a foreign sovereign.

Even assuming that the act of state doctrine applied, there was no danger in this case that enforcement of the subpoena would impinge upon fundamental matters committed by the Constitution to other branches of government. The branch of government to which these matters of foreign policy are committed is the same branch seeking (and obtaining) enforcement of the subpoena. The Court in *Sabbatino* observed that ". . .when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen . . . ." *Id.* at 857-858. If the doctrine applied to this litigation, so would this exception.

8. Beginning at 12:01 P.M., November 14, 1983 and continuing to January 25, 1984 at 12:00 noon, the Bank was in contempt of this Court's order of October 20, 1983. The Bank to date has accrued a daily fine of $25,000.00 per day for a period of 73 days, for a total of $1,825,000, which is now due and owing to the United States of America.

In accordance with the foregoing, it is

ORDERED and ADJUDGED that:

1. Enforcement of the subpoena in this case is proper; and,

2. The Clerk is directed to enter judgment in favor of the United States and against the Bank of Nova Scotia, in the

amount of $1,825,000; execution of said judgment shall be suspended pending the appellate resolution of this litigation.

DONE and ORDERED at West Palm Beach, Florida this 28th day of February, 1984.

James C. Paine /s/
United States District Judge

APPENDIX C

Opinion of the
United States Court of Appeals
for the Eleventh Circuit

722 F.2d 657

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

THE BANK OF NOVA SCOTIA

Defendant-Appellant.

No. 83-5708

United States Court of Appeals,
Eleventh Circuit.

December 28, 1983

Appeals from the United States District Court for the Southern District of Florida

Before FAY and ANDERSON, Circuit Judges, and BOYLE, District Judge*

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* Honorable Edward J. Boyle, Sr., U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

PER CURIAM:

This appeal involves a grand jury subpoena issued by the United States District Court for the Southern District of Florida and served upon the Bank of Nova Scotia at its Miami, Florida agency on March 4, 1983. The subpoena required the production of bank records located in the Bank's branches in Nassau, Bahamas, Georgetown, Grand Cayman Islands, and Antigua, Lesser Antilles. The bank was ordered to comply with the subpoena and found in contempt for failure to do so. Thus this appeal.

While this matter has been pending in our court it appears much has transpired. We are advised by counsel that all of the records have been produced. This is disputed by the government. We have been advised that the appropriate governmental officials of the Cayman Islands have removed any restrictions or obstacles otherwise presented by the banking laws of those islands. We have been told that the Grand Court of the Cayman Islands has vacated its earlier restrictive orders issued in this matter.

As a result of briefing and oral argument, it has come to our attention that there exists a Single Convention on Narcotics Drugs signed by both the United States and the Cayman Islands and letter agreements between officials of the same governments that may control the conduct of the parties involved but that such were not brought to the attention of the trial court. The bank suggests that it was unaware of these documents while the U.S. Attorney suggests his conduct was in compliance with a request by the government of the Cayman Islands.

The bank presents an argument suggesting it has purged itself of any contempt but concedes that issue has never been directed to the trial judge. This court has raised the question of mootness with conflicting responses by the parties and amicus.

During the short pendency of this appeal, the court has received briefs from various amici including the Cayman Islands, Canada, the United Kingdom of Great Britain and Northern Ireland and the Canadian Bankers' Association.

None of these entities presented their views to the district court.

As pointed out by our ccurt *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982) at page 1389, the enforcement of such subpoenas requires the balancing of many factors including the national interests of the countries involved. Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) adopted in *In re Grand Jury Proceedings, United States v. Field*, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976). The district court attempted to do this but we are concerned that much relevant information was either not available or deliberately withheld or both.

In sum, under the peculiar situation that exists, we are remanding this matter for further proceedings. Should amici before us desire to intervene, appropriate petitions should be filed immediately in the district court. Should the bank desire to present additional evidence concerning its efforts to comply with the subpoena, a hearing should be scheduled. All interested entities are urged to render full assistance to the district court. We request that such action be taken within sixty days and that the district court advise us of its findings and conclusions within seventy days of this order.

We retain jurisdiction of this matter and will dispose of the issues presented after the district court holds such proceedings as are necessary and consistent with this order.

APPENDIX D

Supplemental Finding of the United States District Court for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

BANK OF NOVA SCOTIA

Case No. 83-1(WPB) GJ

United States District Court,
S.D. Florida.

October 24, 1983

SUPPLEMENTAL FINDING

This cause came before the Court for a civil contempt hearing on October 20, 1983. On that date, this Court issued an order holding the Bank of Nova Scotia ("the Bank") in civil contempt and levying a fine of $25,000.00 per day until the subpoena was complied with, effective October 26, 1983. The next day, the undersigned received a letter from Mr. William E. Sadowski, Esq., counsel for the Bank, requesting "findings on the good faith issue". Since such a finding may be helpful to the reviewing court and to the parties, this Court will treat Mr. Sadowski's letter as a motion to supplement this Court's order of October 20, 1983.

The Bank seeks a finding on the good faith issue in an attempt to distinguish this case from *In re: Grand Jury Proceedings, United States v. The Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 3086 (1983). Particularly, it is the Bank's p[osition that if this Court finds that the Bank exercised good faith in its efforts to obtain the subpoenaed materials—short of violating foreign law—then it comes within the holding of *Societe Internationale Power Participations' Industriells v. Rogers*, 78 S.Ct. 1087 (1958) and should be excused from the requirements of the subpoena.

Without deciding whether or not a finding of good faith would so support the Bank's argument, this Court is not persuaded that the Bank has exercised good faith in its efforts to comply with the subpoena. The focus of the Bank's efforts has been to obtain from the government what it is clearly not entitled to receive: first, a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and secondly, the forwarding of letters rogatory. (*See* this Court's order of April 27, 1983 and the citations therein.) This Court has given the Bank more than adequate time to exhaust remedies available under Bahamian law and to seek other measures under Caymanian law; the exhibits offered into evidence at the October 20th hearing indicated no such efforts past early June, 1983. Therefore, for the reason that this Court is not persuaded that the Bank has exercised good faith and for the reasons set forth in the 11th Circuit opinion on this issue, this Court concludes that the imposition of the sanction in this case does not violate due process.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Bank of Nova Scotia's motion to supplement this Court's order of October 20, 1983 is granted; and,

2. This Court finds that the Bank of Nova Scotia has failed to make a good faith effort to comply with the subpoena issued in this matter.

DONE AND ORDERED at West Palm Beach, Florida, this 24th day of October, 1983.

JAMES C. PAINE /s/
United States District Judge

cc: Thomas Blair, Esq.
William Sadowski, Esq.
Danforth Newcomb, Esq.

APPENDIX E

Order of the
United States District Court
For the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

THE BANK OF NOVA SCOTIA

Case No. 83-1(WPB) GJ

United States District Court,
S.D. Florida.

October 20, 1983

This cause came before the Court for a civil contempt hearing on October 20, 1983.

On October 10, 1983, this Court ordered the Bank of Nova Scotia ("The Bank") to comply with subpoena *duces tecum* 83-1 served on the Bank on March 4, 1983 no later than October 17, 1983. As of October 20, 1983, there is clear and convincing evidence that the Bank has not turned over the subpoenaed materials and thus, the Court finds the Bank in contempt of the order of October 10, 1983.

This Court must determine next the sanction most likely to coerce the Bank into compliance with the order, bearing in mind that the nature and purpose of civil contempt, and the sanctions imposed because of it, are coercive and seek to obtain compliance with the court's order. *Smith v. Sullivan*,

611 F.2d 1050, 1053 (5th Cir.1980) (citations omitted). *See, also United States v. Roux Laboratories*, 456 F.Supp. 973, 978 (M.D. Fla.1978).

This judgment of civil contempt, and the imposition of sanction that it carries are always conditional and contingent, remediable and able to be purged by compliance with this Court's order. *United States v. Roux Laboratories, supra*, 456 F.Supp. at 978. The crux of what this Court seeks in this order is the submission of the subpoenaed materials to the grand jury and not the punishment of the Bank.

Accordingly, it is ORDERED and ADJUDGED that

1. the Bank of Nova Scotia is hereby held in civil contempt;

2. a sanction in the form of a fine of $25,000.00 per day is hereby imposed, to take effect on October 26, 1983; and,

3. this order is signed and continuing until the Bank purges itself of civil contempt by complying with this Court's order of October 10, 1983, or continuing until the date this Grand Jury expires, whichever may be sooner.

DONE and ORDERED in Miami, Florida, this 20th day of October, 1983.

JAMES C. PAINE /s/

United States District Judge
James C. Paine

cc: Thomas Blair, Esq.
William Sadowski, Esq.
Henry Harfield, Esq.

APPENDIX F

Order of the
United States District Court
for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA

v.

THE BANK OF NOVA SCOTIA

Case No. 83-1(WPB)

United States District Court,
S.D. Florida.

October 10, 1983

This cause came before the Court on motion by the government to compel compliance with grand jury subpoena, filed May 6, 1983, and on motions by the Bank of Nova Scotia ("the Bank") for order containing findings, directing government to act, for further enlargement of time or, alternatively, to be relieved from further obligations under order and subpoena, filed June 1, 1983.

On April 27, 1983, this Court denied the Bank's motion to quash the subpoena duces tecum 83-1, served on the Bank on March 4, 1983, and ordered the Bank to comply with said subpoena no later than May 31, 1983. On June 1, 1983, this Court held a hearing at which the Bank filed the instant motions and presented evidence and argument. At the conclusion of the hearing, this Court reserved ruling on these motions.

After review of the motions, evidence and argument presented this Court is of the view that the government has done all that it is required to do by law and by this Court's order of April 27, 1983 in connection with the enforcement of its subpoena. There can be no doubt that the Bank must comply with the subpoena. Thus, it appears that the course followed by this Court in *In re: Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 3086 (1983) must be followed here: the Bank will be given a brief period of time in which to comply with the subpoena and, at the expiration of that period, a contempt order will issue if the subpoena has not been complied with.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The motion by the government to compel compliance with grand jury subpoena is granted.

2. The motions by the Bank for order containing findings, directing government to act, for further enlargement of time or, alternatively, to be relieved from further obligations under order and subpoena are all denied.

3. The Bank is directed to comply with subpoena duces tecum 83-1 served on the Bank on March 4, 1983 no later than October 17, 1983.

4. A contempt hearing shall be held before this Court on October 21, 1983 at 3:30 p.m. in Courtroom X, Miami, Florida, unless this Court receives notification by both parties of the Bank's compliance with the subpoena before that time.

DONE AND ORDERED at West Palm Beach, Florida this 10th day of October, 1983.

JAMES C. PAINE /s/
United States District Judge

cc: Thomas Blair, Esq.
William Sadowski, Esq.
Henry Harfield, Esq.

APPENDIX G

Order of the
United States District Court
for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

BANK OF NOVA SCOTIA

Case No. 83-1(WPB)

United States District Court,
S.D. Florida.

April 27, 1983

This cause came before the court on motion by the Bank of Nova Scotia ("The Bank") directed to subpoena 83-1, filed April 4, 1983.

The Bank seeks an order quashing the subpoena duces tecum served on it on March 4, 1983. Many of the same arguments raised by the Bank in this motion were resolved against it by the 11th Circuit in a similar case: *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir.1982). For the reasons stated in that case, this court will decline to quash the subpoena notwithstanding that compliance would allegedly require the Bank to violate foreign bank secrecy laws. *Id.* Additionally, this court has not the authority to require the government to demonstrate the materiality and necessity of the subpoenaed documents to the grand jury investigation. *Id.* at 1387 (citations omitted).

Since the Bank may very well face difficulty in producing the subpoenaed documents, additional time will be granted in which to comply. Because the government may very well be able to assist the Bank in obtaining the documents, the government will be required to provide any reasonable assistance, especially in dealing with the foreign governments; however, the government is not required to forward letters rogatory. *See, United States v. Vetco, Inc.* 644 F.2d 1324, 1332-1333 (9th Cir. 1981).

Accordingly, it is ORDERED and ADJUDGED that

1) the motion by the Bank to quash the subpoena duces tecum 83-1, served on the Bank on March 4, 1983 is denied;

2) the Bank's motion for an extension of time in which to respond to said subpoena is granted; the Bank shall comply with said subpoena no later than May 31, 1983; and,

3) the government shall provide any reasonable assistance to the Bank in obtaining the subpoenaed documents but is not required to forward letters rogatory.

DONE and ORDERED at West Palm Beach, Florida, this 27th day of April, 1983.

JAMES C. PAINE /s/

United States District Judge
James C. Paine

cc: Thomas Blair
William Sadowski
Henry Harfield

/

APPENDIX H

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX I

Federal Rule of Criminal Procedure 42(b)

Rule 42. Criminal Contempt

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX J

Federal Rule of Criminal Procedure 17(g)

Rule 17. Subpoena

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

APPENDIX K

Federal Rule of Civil Procedure 45(f)

Rule 45. Subpoena

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

APPENDIX L

Section 10, The Banks and Trust Companies Regulation Act of the Bahamas (1965), *as amended*

10.—(1) No person who has acquired information in his capacity as—

(a) director, officer, employee or agent of any licensee or former licensee;

(b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act, 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act, shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall—

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

APPENDIX M

Cayman Islands Confidential Relationships (Preservation) Law (1976), *as amended*, Confidential Relationships (Preservation) (Amendment) Law (1979);* Practice Note from the Clerk of the Grand Court, Cayman Islands

A Law to give sanction to the duty of non-divulgence of information imparted under conditions of professional confidence express or implied.

ENACTED by the Legislature of the Cayman Islands.

[short title

1. This Law may be cited as the Confidential Relationships (Preservation) Law]

short title

1. *This Law may be cited as the Confidential Relationships (Preservation) (Amendment) Law, 1979*

Interpretation.

2. In this Law, unless the context otherwise requires—

"bank" "licensee" and "trust company" have the meanings ascribed to them in the Banks and Trust Companies Regulation Law, 1966;

"business of a professional nature" includes the relationship between a professional person and a principal, however the latter may be described;

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* This statute was intially passed by the Legislative Assembly on September 8, 1976, and was substantially amended on September 6, 1979. However, the Cayman Islands has not re-codified the statute. For the convenience of the Court, the statute, *as amended*, has been reprinted to reflect the 1979 amendments. Brackets indicate the deletions made in 1979; italics indicate additions.

"confidential information" includes information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge;

"criminal" in relation to an offence means an offence contrary to the criminal law of the Islands;

["entitled to possession of confidential information" means so entitled under the law of the Islands, in the normal course of business or by the specific consent of the relevant principal;]

"Governor" means the Governor in Council;

"Inspector" means the Inspector of Banks and Trust Companies and to the extent of his authorization every person authorized by the Governor to perform his functions as such;

"normal course of business" means the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees;

"principal" means a person who has imparted to another confidential information in the course of the transaction of business of a professional nature;

"professional person" includes a public or government official, a bank, trust company, an attorney-at-law, an accountant, an estate agent, an insurer, a broker and every kind of commercial agent and adviser whether or not answering to the above descriptions and whether or not licensed or authorized to act in that capacity and every person subordinate to or in the employ or control of such person for the purpose of his professional activities;

"property" includes every present, contingent and future interest or claim, direct or indirect, legal or equitable, positive or negative, in any money, moneys worth, realty

or personalty, movable or immovable, rights and securities thereover and all documents and things evidencing or relating thereto.

Application and scope.

3. (1) [This] *Subject to subsection (2), this* Law has application to all confidential information with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout.

[(2) This Law has no application, unless otherwise herein provided, to confidential information received or given—

(a) to any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal;

(b) to constables investigating offences committed or alleged to have been committed within the jurisdiction;

(c) to constables, specifically authorized by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the jurisdiction which if committed in the Islands would be a criminal offence;

(d) to the Financial Secretary or the Inspector.]

(2) This Law has no application to the seeking, divulging, or obtaining, of confidential information—

(a) in compliance with the directions of the Grand Court pursuant to section 3A:

(b) by or to—

(i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal;

(ii) a constable of the rank of Inspector or above investigating an offence committed or alleged to have been committed within the jurisdiction;

(iii) a constable of the rank of Inspector or above, specifically authorised by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the Islands which offence, if committed in the Islands, would be an offence against its laws; or

(iv) the Financial Secretary, the Inspector or, in relation to particular information specified by the Governor, such other person as the Governor may authorise;

(v) a bank in any proceedings, cause or matter when and to the extent to which it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer;

(vi) the relevant professional person with the approval of the Financial Secretary when necessary for the protection of himself or any other person against crime: or

(c) in accordance with the provisions of this or any other Law.

3A. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding be being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.

(2) Application for directions under subsection (1) shall be made to, and be heard and determined by, a Judge of

the Grand Court sitting alone and in camera. *At least seven day's notice of any such application shall be given to the Attorney General and, if the Judge so orders, to any person in the Islands who is a party to the proceedings in question. The Attorney General may appear as* amicus curiae *at the hearing of any such application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either personally or by counsel.*

(3) Upon hearing an application under subsection (2) a Judge shall direct—

(a) that the evidence be given; or

(b) that the evidence shall not be given; or

(c) that the evidence be given subject to conditions which he may specify whereby the confidentiality of the information is safeguard.

(4) In order to safeguard the confidentiality of a statement, answer or testimony ordered to be given under subsection (3) (c) a Judge may order—

(i) divulgence of the statement, answer or testimony to be restricted to certain named persons;

(ii) evidence to be taken in camera; *and*

(iii) reference to the names, addresses and descriptions of any particular persons to be by alphabetical letters, numbers or symbols representing such persons the key to which shall be restricted to persons named by him.

(5) Every person receiving confidential information by operation of subsection (2) is as fully bound by the provisions of this Law as if such information had been entrusted to him in confidence by a principal.

(6) In considering what order to make under this section a Judge shall have regard to—

(a) whether such order would operate as a denial of the rights of any person in the enforcement of a just claim;

(b) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of secrecy under this Law;

(c) in any criminal case, the requirements of the interests of justice.

(7) In this section, unless the context otherwise requires—

"court" bears the meaning ascribed to it in section 2 of the Evidence Law;

"given in evidence" and its cognates means make a statement, answer an interrogatory or testify during or for the purposes of any proceeding;

"proceeding" means any court proceeding, civil or criminal and includes a preliminary or interlocutory matter leading to or arising out of a proceeding.

Offences and penalties.

4. (1) Subject to the provisions of sub-section (2) of section 3, whoever—

(a) being in possession of confidential information however obtained;

(i) divulges it; or

(ii) attempts, offers or threatens to divulge it [to any person not entitled to possession thereof;]

(b) willfully obtains or attempts to obtain confidential information [to which he is not entitled;]

is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 2 years or both.

(2) Whoever commits an offence under sub-section (1) and receives or solicits on behalf of himself or another

any reward for so doing is liable to double the penalty therein prescribed and to a further fine equal to the reward received and also to forfeiture of the reward.

(3) Whoever, being in possession of confidential information, clandestinely, or without the consent of the principal, makes use thereof for the benefit of himself or another is guilty of an offence and on summary conviction liable to the penalty prescribed in sub-section (2) and for that purpose any profit accruing to any person out of any relevant transaction shall be regarded as a reward.

(4) Whoever being a professional person, entrusted as such with confidential information, the subject of the offence, commits an offence under subsections (1), (2) or (3) is liable to double the penalty therein prescribed.

(5) For the removal of doubt it is declared that, subject to subsection (2) of section 3, a Bank which gives a credit reference in respect of a customer without first receiving the authorization of that customer is guilty of an offence under subsections (1) and (4).

[Savings.

5. Nothing in this Law shall by implication be deemed to derogate from the rule in Tournier v. National Provincial and Union Bank of England (1924) 1KB, 461, (which deals with the civil duty of banks to preserve the confidentiality of the business of their customers) which rule is declared to have application to the Islands.]

Regulations.

6. The Governor may make regulations for the administration of this Law.

Attorney General's fiat.

7. No prosecution shall be instituted under this law without the consent of the Attorney General.

PRACTICE NOTE

TO: ALL ATTORNEYS-AT-LAW

SECTION 3A OF THE CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW

I have been directed by the Honourable the Chief Justice to bring to the attention of practitioners that where directions are sought under section 3A of the Confidential Relationships (Preservation) Law the documents accompanying the application should normally:

(i) describe with particularity the nature of the evidence to be given (without divulging the confidential information concerned) e.g. "to reveal the names of the settler and the beneficiaries of a trust made on the . . . day of . . . in respect of which the applicant is a trustee" or "to reveal transactions reflected in the accounts of . . . concerning the deposit and withdrawal of money on the . . . day of . . . and on the . . . day of . . . "

(ii) disclose whether or not the person likely to be affected by the disclosure of the confidential information is a party to the cause or action in respect of which it is proposed to adduce the evidence.

(iii) set out the grounds on which it is sought to justify the disclosure; and these would normally have to be substantial where disclosure relates to the confidential affairs of a person who is not a party to the proceedings in respect of which it is sought.

(iv) specify whether the person likely to be affected by the disclosure is in the Islands.

(v) indicate the relevance of the evidence sought to be disclosed to the proceedings concerned with particular reference to paragraphs (a) or (c) of section 3A (6).

DATED the 29th Day of April 1982.

CLERK OF THE COURT.

APPENDIX N

Orders of the Grand Court, Cayman Islands

IN THE GRAND COURT
CIVIL JURISDICTION
CAUSE NO. 187 OF 1983
IN CHAMBERS

In the Matter of the Confidential Relationships (Preservation) (Amendment) Law

—and—

In the Matter of subpoena duces tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia

—and—

In the Matter of an application by the Bank of Nova Scotia for directions under S. 3A of the Confidential Relationships (Preservation) (Amendment) Law

ORDER OF COURT

Made the 11th November, 1983

Upon this application by The Bank of Nova Scotia coming before the Court this day And Upon hearing Mr. John Stafford for the Applicant and Mr. Richard Ground for the Attorney-General as amicus curiae And While this Court is

anxious to assist foreign tribunals in the due administration of justice it can only do so in accordance with local Law;

And While it is a provision of the local Law, namely Section 3A (6) (c), that before any direction for confidential information to be divulged in a criminal case the applicant for directions must show the Court that such divulgence is in the interests of justice;

And While the Court requires that the documents accompanying the application should set-out, inter alia, the grounds on which it is sought to justify the divulgence namely in a criminal case that the evidence sought is relevant to specific allegations of a criminal offence which if committed in the Islands would be an offence contrary to our Law and indicate the relevance of the evidence sought to be disclosed to the proceedings concerned;

And While the Court has given careful consideration to the additional material contained in Mr. Stafford's affidavit including a copy of the emergency motion to vacate the stay filed before the United States Court of Appeals Eleventh Circuit;

This Court is unable to satisfy itself at present that there are any grounds for divulgence or that the evidence sought is relevant to any criminal proceedings IT IS ORDERED that the earlier Order of this Court made the 31st May 1983 in this Cause continue with full effect.

This Order is without prejudice to the renewal of this application in the event that the prosecuting authorities supply the applicant with material from which it might satisfy this Court as required by Law.

General liberty to apply.

Liberty to produce a sealed copy of this Order and of the Order dated the 31st May 1983 to the United States Attorney having conduct of proceedings No. 83-1 (WPB) and to any Court concerned therewith.

/s/

Acting Chief Justice

IN THE GRAND COURT
CIVIL JURISDICTION
CAUSE NO. ___ OF 1983
IN CHAMBERS

In the Matter of the
Confidential Relationships (Preservation) Law

—and—

In the Matter of a subpoena duces tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia

—and—

In the Matter of an application by the Bank of Nova Scotia for directions under S. 3A of the Confidential Relationships (Preservation) Law

ORDER OF COURT

Made the 31st day of May 1983

Upon the application by Bank of Nova Scotia for directions under the Confidential Relationships (Preservation) Law coming before the Chief Justice in Chambers this day And Upon reading the application and the affidavit of Mr. John Alder in support thereof And Upon hearing Mr. John Stafford for the applicant and Mr. Richard Ground for the Attorney General And it appearing from the application that the said proceedings may involve investigating whether an offence has been committed in connection with trafficking in narcotics as well as

in connection with the inland revenue of the United States IT IS HEREBY ORDERED that The Bank of Nova Scotia be directed not to communicate in contravention of the said Confidential Relationships (Preservation) Law any information concerned with the conduct of its business in the Cayman Islands to any person outside the jurisdiction of this Court and The Bank of Nova Scotia is further directed that it may not produce in contravention of the said Confidential Relationships (Preservation) Law any books or records presently pertaining to its business in the Cayman Islands or any copies or extracts thereof and particularly not of any account kept in the names of Frank J. Brady, Paula Brady, Frank J. Brady Enterprises Inc., Brady Farms Inc. and/or Clay Island Farms, Inc., or West Indies Island Tourist Company Ltd. at the local branch of the said bank without the further order of this Court.

The foregoing order relates solely to the said subpoena duces tecum and matters related thereto and connected therewith pending identification by the United States of the confidential information sought to be released and establishment of justification for such release pursuant to section 3A (6) of the said Confidential Relationships (Preservation) Law when further application may be made for its release.

And It Is Further Ordered that the applicant be at liberty to produce a sealed copy of this order to the United States attorney having conduct of proceedings No. 83-1 (WPB) before the Grand Jury in the United States District Court for the Southern District of Florida.

Liberty to the Attorney General and The Bank of Nova Scotia to apply.

/s/

Chief Justice

APPENDIX O

Rule 28.1 Listing of Parents, Subsidiaries and Affiliates of the Bank of Nova Scotia

Amaco (Netherlands) B.V.
Antillean Management Corporation "AMACO" N.V.
The Bank of N.T. Butterfield & Son Limited
The Bank of Nova Scotia Jamaica Limited
The Bank of Nova Scotia Trust Company Jamaica Limited
The Bank of Nova Scotia Trinidad & Tobago Limited
The Bank of Nova Scotia Trust Company of the West Indies Limited
Brunswick Square Limited
Canborough Limited and the Canborough Corporation
Caribbean Credit Corporation N.V.
Caribbean Financial Services Corporation Limited
Caribbean Mercantile Bank N.V.
Caribbean Mercantile Trust Company N.V.
Chargex Limited
Export Finance Corporation of Canada Limited
Fredericton Developments Limited
ICIC Holdings Limited
Industrial Credit Insurance Company
Maduro & Curiel's Bank N.V.
Maduro & Curiel's Bank (Bonaire) N.V.
Maduro & Curiel's (Bonaire) Trust N.V.
Maduro & Curiel's Insurance Services N.V.
Maduro & Curiel's Trust Company N.V.
N.V. De Curacaosche Hypotheekbank
N.V. De Spaar En Beleenbank Van Curacao
N.V. Trust—En Administratie Maatschappij Van Maduro & Curiel's Bank N.V.
Pan Caribbean Merchant Bank Limited
Progress N.V.
Schroder, Darling and Company Holdings Limited
Schroder, Darling and Company Limited

Scotia Centre Limited
Scotia-Toronto Dominion Leasing Limited
Scotiabank de Puerto Rico
Singapore Gold Clearing House Private Limited
VCDL Investment Limited
The West India Company of Merchant Bankers Limited
The Windward Islands Bank Limited

CERTIFICATE OF SERVICE

I, Henry Weisburg, a member of the Bar of this Court, certify that three copies of the annexed petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit have been served this ____ day of August, 1984, by mail, postage prepaid, upon the following counsel:

Linda Collins Hertz
Assistant United States Attorney
155 South Miami Avenue
Miami, Florida 33130-1693

Solicitor General of the United States
U.S. Department of Justice
Room 5139
Main Justice Building
Washington, D.C. 20530

Attorneys for Respondents

_____

Henry Weisburg